E8lnchr1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

UNITED STATES OF AMERICA

v. 12 CR 626 (ER)

RAYMOND CHRISTIAN a/k/a "Reckless"
GLENN THOMAS, a/k/a "Gucci"
TYRELL WHITAKER, a/k/a "Bow Wow"

Defendants

----------x

New York, N.Y.
August 21, 2014
9:20 a.m.

Before:

HON. EDGARDO RAMOS
District Judge

APPEARANCES

PREET BHARARA
United States Attorney for the
Southern District of New York
ANDREW BAUER
KAN M. NAWADAY
Assistant United States Attorney

DAVID S. GREENFIELD
and
ANTHONY STRAZZA
Attorneys for Defendant Christian

LAW OFFICES OF DON BUCHWALD
Attorney for Defendant Thomas
DON D. BUCHWALD

KELLEY DRYE & WARREN LLP
Attorney for Defendant Thomas
LEVI DOWNING

GEORGE ROBERT GOLTZER
and
YING STAFFORD
Attorneys for Defendant Whitaker

-- also present--
S.A. Andrei Petrov - FBI

(Trial resumed)

(In open court; jury not present)

THE COURT: Good morning, Mr. Buchwald.

I understand you have an application.

MR. BUCHWALD: I do. The discussion yesterday concerning the need to have separate firearms for the two firearm counts, I think it is important from our perspective before our summation that we understand the firearm that is allegedly involved on December 15, 2010. What is the other firearm that Mr. Thomas is charged with? I think we should know that before the summation.

MR. BAUER: Three weeks of trial, your Honor, lots of evidence about a lot of other guns.

MR. BUCHWALD: I think we are entitled to know which one, particularly to know which one the grand jury indicted on.

What was presented to the grand jury in the way of the second weapon, what was the basis for that indictment, because otherwise there has been a violation of the constitutional requirement that we be tried upon the basis of a valid indictment.

The grand jury must have charged on a particular basis, and we would like to know what that is. Otherwise, there is a fatal variance here. We would request to know what that is, have your Honor inspect the grand jury minutes, if necessary, to see if the grand jury was presented with the

second firearm upon which Mr. Thomas is charged.

THE COURT: What other evidence concerning whether Mr. Thomas specifically had guns? He was arrested with a gun, wasn't he?

MR. BAUER: Yes. February 28, 2011, in the middle of the narcotics conspiracy. We had the cooperator come on and say that he possessed guns on other occasions. We oppose the request, your Honor. I mean, the record here is very clear that there is at least enough evidence to go back to the jury. If Mr. Buchwald wants us to reargue that count for him now on the record, we oppose it.

MR. BUCHWALD: With respect to that, your Honor, so I that I can make my record --

THE COURT: Sure.

MR. BUCHWALD: -- part of our application is to dismiss the second count if there was not presented to the grand jury a basis for the second firearm.

Number two, is, as a matter of law, on this record, our position is that the February 28 firearm, there was no connection of that February 28 firearm to a Hobbs Act robbery or to narcotics. The evidence is clear what happened. He walks out of a store. He has a gun in his underwear. There is no connection to that.

While there was talk about the police having arrested because there was probable cause and a robbery in the

neighborhood, their witness, Mallory testified unequivocally that Mr. Thomas had not been involved in that robbery.

So, as a matter of law, that gun cannot be the basis of the firearm charge here. But, in any event, we are entitled to know what the grand jury was presented with. Otherwise we have violated the grand jury oath.

THE COURT: Mr. Bauer.

MR. BAUER: Judge, I feel like we have talked about this five times now with Mr. Buchwald. One of the elements of 924(c) is possession of a firearm during the narcotics conspiracy.

MR. BUCHWALD: It is during and in relation to. The fact that you have a firearm within a four-year period doesn't make you guilty of that offense.

MR. BAUER: Good luck with that argument in front of the jury. You are wrong about this, Mr. Buchwald. Besides the fact that Mr. Mallory said that just earlier that day that very gun, Mr. Thomas had it with him he went to a drug program. Before he went to the drug program he said he was looking for a joke. Who do they rob? They rob drug dealers. There is direct evidence about that particular gun, not that it is necessary.

Mr. McDermott said he saw Mr. Thomas with that gun on a number of occasions. Mr. Mallory said he saw him with that gun on a number of occasions. On some of those occasions he

had drugs with him, too. This is enough about this argument. I don't know why I have to keep defending this, your Honor.

THE COURT: The application is denied.

Mr. Bauer, Mr. Nawaday, have you shared with the defendants your proposed change to the multiple conspiracy charge?

MR. STRAZZA: I am sorry, your Honor, on behalf of Mr. Christian we just want to preserve the record and join in Mr. Buchwald's application on the grand jury point.

THE COURT: Very well.

MS. STAFFORD: Mr. Whitaker made that argument yesterday with respect to our specific request.

THE COURT: Very well.

MS. STAFFORD: Thank you.

MR. BAUER: My only comment -- no, I did not share it with them -- the multiple conspiracy charge at the bottom of page 26, the first sentence is an introductory sentence that refers to the conspiracy charged, and we would like it to be clear that the conspiracy charged, we can either call it the narcotics conspiracy or the conspiracy charged in Count Three just to be clear that the multiple conspiracy charge does not apply to Count One.

THE COURT: I think that is an appropriate change, since there is no question that there is only one Hobbs act conspiracy here, so we will make that change.

So it will read, "You must decide whether the narcotics conspiracy charged in Count Three of the indictment existed" will be the first line.

MR. BAUER: Thank you, your Honor.

THE COURT: Are we otherwise ready to begin.

Mr. Buchwald?

MR. BUCHWALD: Can I just inquire of where this is.

THE COURT: It is page 36.

MR. BUCHWALD: I understand that. There was one place where we had to search something -- I think I did see it about the 2007 drugs.

THE COURT: Yes, that is in there.

MR. BAUER: Judge, I will put on the record that last night I circulated a proposed verdict form. I did not hear from defense counsel last night about the verdict form, but I polled them this morning. As far as I know, they have no requested changes to it. I'm sorry. Mr. Dratel did have one.

MR. DRATEL: I think that not guilty should be before guilty. There is a presumption of innocence that exists until the jury finds the evidence sufficient beyond a reasonable doubt. I believe not guilty should be the first choice rather than guilty. I think that it is the government's burden.

THE COURT: Any objection?

MR. BAUER: Yes, your Honor. I followed the verdict forms -- we have a verdict form library. I looked at about 20

of them, of recent ones used by our office. Every single one says guilty before not guilty. I think we should stick with the practice here.

THE COURT: I have not had this issue raised, but as I think about any verdict that I have ever heard taken, the question is always, How do you find the defendant? Guilty or not guilty.

MR. DRATEL: It's just -- it wasn't me.

THE COURT: OK. I won't make that change.

Mr. Buchwald.

MR. BUCHWALD: Finally, your Honor, last night we asked that a sentence be added, additional language to the effect that, I remind you in your consideration of Mr. Thomas you may not consider Mr. Thomas' possession of the firearm on February 28, 2011, that is, Government Exhibit whatever that firearm is, as evidence of any firearms charge against Mr. Thomas.

I take it that your Honor has denied that request? We did want to make it clear for the record that we made such a request.

THE COURT: OK.

MR. DRATEL: Your Honor, we don't have to restate our objections to the charge as it is right now? All the ones we made yesterday are considered to be made? In other words they are incorporated from yesterday?

THE COURT: Correct.

MR. BUCHWALD: We will incorporate by reference at the sidebar here all of the arguments made yesterday?

THE COURT: Yes.

MR. GOLTZER: On behalf of all of the defendants?

THE COURT: Yes.

Anything further.

MR. BAUER: Finally, your Honor, the government sent around a cleaned up indictment to send back to the jury. I have heard no objections about that as well.

THE COURT: Did Ms. Miller tell you we did make one change to your verdict form.

THE LAW CLERK: The numbering under Count Five had read 3A, etc. We changed it to 5A.

MR. BAUER: That makes sense. If there's nothing further, we have about five minutes for the jury. So we'll see where they are and get started.

Who is going to be first?

MR. DRATEL: I am.

THE COURT: Mr. Dratel.

MR. DRATEL: Yes.

THE COURT: Your time estimate is still about the same?

MR. DRATEL: Yes.

THE COURT: For you, Mr. Greenfield, what say you.

MR. GREENFIELD: Same as I said before. About an hour and a half. I could cut it as I go along. I'm really never very good with time, Judge.

THE COURT: OK.

The jury is all here. Do you guys want to get started?

MR. DRATEL: I just need Ms. McInerney.

THE COURT: We need Ms. McInerney?

MR. NAWADAY: Yes, your Honor. She also a getting some of the exhibits for defense counsel.

MR. BUCHWALD: She's indispensable.

MR. BAUER: Judge, I did have one other note to raise with the Court this morning. It was with regards to something that Mr. Goltzer had focused on in his closing, that was he had questioned why the jury was only shown parts of the Burden video. I thought that was misleading to the jury, and I would have proposed that you either verbally or, probably a little too late, to add it to your jury instructions. Maybe verbally then instruct them something along the lines of that they were only shown the portions of the video that you deemed admissible.

MR. GOLTZER: That's fine. If I said it, I don't even realize it. I don't remember saying it.

THE COURT: I remember it. I was surprised that there wasn't an objection at the time actually, but I do remember it.

MR. GOLTZER: Probably a subconscious slip.

THE COURT: I will just mention that, because I think we have hit the print button on the charges.

MR. BAUER: That's fine.

Thank you, your Honor.

THE COURT: Any ETA?

MR. BAUER: Mr. Nawaday just called her and she was loading her cart with the guns requested and she was on her way.

Here we go.

THE COURT: OK. Can we get the jury.

(Jury present)

THE COURT: Good morning, everyone. Please be seated. Ladies and gentlemen, before we continue with the closing arguments, just one minor thing from yesterday. You may recall that during his summation, Mr. Goltzer made reference to the Burden tape and that only certain parts of it were shown to you. Well, that's actually on me. The only parts that were shown to you were the parts that I determined to be admissible.

With that, we will continue with the summations. On behalf of Mr. Thomas, Mr. Dratel.

MR. DRATEL: Thank you, your Honor.

Good morning, ladies and gentlemen.

Mr. Buchwald, Mr. Downing and myself have the privilege of representing Glenn Thomas at this trial.

May it please the Court, I want to thank you for your service, for your attention during the trial. I know it is a task to sit for hours listening to testimony over a three-week period. We all appreciate it. Mr. Thomas appreciates it as well.

Mr. Thomas has committed crimes, and you have heard about them already, possession of a gun in February of 2011. He pled guilty in federal court. It was an inoperable gun so the state could not prosecute it. He had a prior drug offense from 2007, which is not part of this case, but he didn't commit the crimes charged in this indictment.

He admitted the crimes that he's committed, and he's been punished for them already.

But what was interesting about Mr. Thomas going to jail, he was in jail for a significant period during the whole course of this case in terms of what the time frame of this case is. I will talk about that in detail more.

But what is interesting about him being in jail in February of 2011 for that gun that he was found with by the Newburgh police is that he became an easy target for others who were responsible for the events in this case who you heard from the witness stand. He became an easy target to name as someone who was there, someone who wasn't there, but who they could name, as he was already in jail. He was already gone. He wasn't someone out on the street to protect.

I thought about how this case could be characterized. I kept coming up with words beginning with the letter C. One was that what the government's case lacks. It lacks credibility, it lacks consistency, it lacks corroboration. All words that the government in its summation contended it has, but I will review the evidence with you and you will see it lacks all of those.

Instead what this case is about is cooperators, the witnesses on the stand and the collusion among them that created and generated their testimony that you heard this month.

There is one more word beginning with a C, it is important for all of you: Common sense. Common sense is critical, your life experience.

I won't be able to cover everything obviously. There is too much detail, too much testimony to cover everything. Mr. Goltzer has already summed up, Mr. Greenfield will sum up after me, and they will cover a lot as well.

I know many of you or all of you have taken notes at one time or another, so I am not going to go chapter and verse with a lot of this, but essentially review it and summarize it in some detail because I want to illustrate the points and issues and conclusions about the evidence. All the evidence and the testimony is available to you. You can have it read back. You will have the exhibits. You can review what you

need to review in the course of your deliberations. Once we go through this, the only conclusion you will be able to draw I submit to you is that Mr. Thomas is not guilty of each and every count charged against him in this indictment.

Now, you have in evidence Mr. Thomas' plea allocution, his guilty plea proceeding in federal court where he admitted his guilt to the Court. It refers to that prior drug conviction in 2007, again, not part of this conspiracy.

I want to first talk about some of the evidence from the people who weren't cooperating witnesses necessarily: Police officers, some of the victims of the robbery, although they were in a sense cooperating on a certain level. They had expectations from the government, some of them, but not to the participants in the robbery themselves who testified.

The factual inconsistencies, the government says the facts match up and line up here, and they really don't. They lack the consistency and detail.

This is something about common sense and life experience, and the hallmarks of candor is consistency in detail; not consistency in a general allegation, but consistency in detail. That's the way lies are found. It is not so much in the sense that two people tell two different stories that somehow match up at the top, but they match up at the bottom. Lies are detected by inconsistency, by the fact that people can't tell the same false story over and over again

when it didn't happen. It's easy to tell it when you live it and tell it consistently. It's hard when you have to take it from your mind where it was created.

So ask yourself when you are reviewing the testimony, when you think about the government's case, what details are corroborated among these cooperators, the important witnesses.

The government made the argument, it's the only argument they can make in this case given the nature of the testimony, that somehow not remembering is more credible than remembering. I submit to you you know the difference between remembering and not remembering, what that means as far as whether someone is credible or not credible. The wall of evidence that the government displayed is really based on a foundation that is crumbled, which is the testimony of those cooperators.

Let's talk about the forensics. Forensics don't match the government's case with respect to Mr. Thomas. There's nothing linking Mr. Thomas to 54 Chambers Street.

Mr. Henry was killed by a 9-millimeter bullet. The government tries to make it seem like we are arguing who actually shot the weapon that killed Mr. Henry. That's not what this is about, because that doesn't make a legal or factual difference, as the judge will tell you, but it's about Mr. Thomas. They are trying to put a .38 in his hands. There is no .38 bullet that killed Mr. Henry. There are in fact

shell casings from .380s and from 9-millimeters. They wouldn't find shell casing from revolvers necessarily, but they don't have any projectiles there are eight projectiles and there are none that are from a .38. There are two in the. 38 class. Those could have been from the .380, they could have been from a .357, they could have been from a .32 or a 9-millimeter. And you know that you can't put a 9-millimeter bullet in a 38 because Sergeant Frederick tried it himself and he couldn't do it.

Where were these .38 slugs if Mr. Thomas was there firing? They weren't there. You didn't see them. They weren't recovered because they were never there because he was never there.

Sergeant Carrion testified that he was told by Marshall Williams, an eyewitness that night -- right then, not four years later, not 18 months later, not after he was cooperating, not after he got in trouble and had to work out a deal -- that night Marshall Williams had four or five people running away, not seven. The people running down the street, who knows who they were. They could have been some of the people from the apartment running away.

You have the testimony of Mr. Smith and Mr. Boone, which I will get into in more detail as I compare it to the testimony of the cooperating witnesses. But none of that puts Mr. Thomas there at all.

Collusion among those cooperators.

The government made a lot of, and probably will on its rebuttal, of the tape that Mr. Mallory made with respect Mr. Burden. They call it the Burden tape. It's really the Mallory tape, because he's the architect of it.

I think it's important not so much what the government thinks of this but for what it shows you about Mr. Mallory, that he orchestrated so much of this. He feeds Mr. Burden all the lines. He preys on a hapless, nearly incoherent alcoholic and has him parrot back what he feeds him. I'll go into that in a little more detail.

The government argued that these people couldn't have colluded. They are not capable of it, that you saw them. I think it's somewhat the arrogance of those of us maybe with too much education to think that people like Jamar Mallory and Anthony Baynes and Ramone McDermott and Danielle Williams somehow don't have the capacity to do it.

Look at their skills. Look at Jamar Mallory's skills. This is a guy who was on the street, cooperating, reporting to detectives and FBI agents on a daily basis, meeting with them a couple of times a week; at the same time, smoking PCP, smoking pot, robbing people at the same time taping down his good friends 15 different times. Not a single person was aware of what he was doing. He was that good. Ninety minutes, two-hour sessions, he was that good.

He was not discovered by anyone on either side what he was doing. The government didn't even know what he was doing until after he was already in jail for testing positive two months after his plea, two months after he signed his cooperation agreement.

Think about that deal. The most extraordinary part is that he does a robbery with this guy quick, and then he tapes the guy, gets him arrested, and he's going to get credit for putting him in jail and he doesn't get charged with it. That's sweet. That is someone with skill.

Danielle Williams same thing. She operates as an informant on the street while she's leading her criminal lifestyle at the same time, right under their noses.

Mr. McDermott comes here with a work permit to the United States. I don't think the work permit said sell marijuana and commit armed robbery. But, yet, within a year and a half, maybe less, he's making $10,000 a week for two days of work. Not prosecuted for the marijuana, only for that robbery that he was involved in. All that money, forget taxes, he's not even prosecuted for selling it.

He knew how to collect information that was valuable to the time during his time in jail so that he could increase his value and make his deal and stay here, because to him it is a matter of life and death.

These people have survival skills when a lot is at

stake for them.

The government said, why don't they have more, lies more intricate lies, more elaborate lies. But that is not the nature of what these lies are. They didn't have all the time in the world. They don't have that kind of sophistication. You keep it simple and vague so you avoid contradicting each other. But what you also lack is consistency among the stories. That's why they are vague and general, and there's no consistency in the detail that you would find in stories that are true, with accounts are true.

Let's talk about the contacts among these cooperators and how it proves to you that they had the opportunity -- by the way, we don't have the burden to prove any of this. It's always the government's burden. They've accepted it.

But the point is, if it raises a doubt in your mind about their credibility, if it raises a doubt in your mind, a reasonable doubt, you must acquit Mr. Thomas. It's that simple. Those are the rules.

Major players, Baynes, Mallory, McDermott, they all met and spoke in prison and they had a chance to discuss this case, the Jeffrey Henry homicide.

Even before he went to jail Baynes had seen the Facebook posts that Mr. Thomas had been arrested. Fair game. He's out of the picture. He's a lost cause already. Let's pin it on him.

But, you know, Baynes doesn't even mention Thomas initially. Mr. Mallory first goes to jail. Mr. Baynes is arrested April 6, 2011; Mallory, July 15, 2011. Baynes admits that he spoke to Mallory at the Orange County jail. The first time Mr. Baynes includes Mr. Thomas as a participant is not until March of 2012, which is well after Mr. Baynes has had this opportunity to talk to Mr. Mallory.

Baynes spoke with Mallory, Baynes spoke with stacks, another person who Mr. Mallory says was involved in the homicide. They spoke at Orange County jail. That is at transcript 756 to 758. I will make cites to the transcript, but you can have it read back. I will cite it just for convenience.

Baynes and McDermott met at the Orange County jail, and McDermott -- by the way, Baynes said, oh, I never spoke to him. He was in protective custody. But you heard McDermott say, yes, I did speak to Baynes. In fact, Baynes told him who was involved in the homicide. So Baynes is clearly trying to avoid letting you know that they've all gotten together and discussed this case.

McDermott and Mallory met at the Geo facility. Transcript at 2000 is where Mr. McDermott confirms that he and Baynes spoke, and Baynes denied the contact at 760.

This is the third quarter of 2011, which is when Mr. McDermott says he spoke to Mr. Baynes. So it's after

Mallory has already gotten to Baynes, it's before Baynes puts Mr. Thomas in the mix.

This is like a game of telephone, where each guy tells a story and it comes out differently at the end, because it's not the real story. It's just a story that's been retold and recast by each of them in their own way.

Mallory even said that his memory about something was refreshed by Snelly, that Stacks was there. Imagine he says refreshed, which means he knew it at another time. I also ask you why does Snelly know this. Snelly said he provided a gun. That's what he told Mallory. We don't know precisely what his involvement was. He could have been there, too.

Also, notice how these witnesses, two witnesses in particular try to take Mallory out of the equation in terms of what happened around the time of the December 14 and December 15.

Baynes adamantly denied it, if you look at transcript 705, adamantly denies that he mentioned Mallory in some of his early sessions with the government.

Yet one of the stipulations read yesterday, T3, talks about December 15, 2010 before he's had a chance to talk to Mallory. He talked about the older guy. It sounds like L-1 calling to have a chain brought, not picked up, brought. And another time he was told that J-Mark said that Big L had something to do with the Joker homicide, but he denied that,

but we showed that he did say it. Withdrawn. Yes, we showed that he did say it in the stipulation, that the police took notes, the agents, the prosecutors, law enforcement took notes, and that's what he said.

MR. BAUER: Objection.

THE COURT: Overruled.

MR. DRATEL: If the government wants to contest what their own people wrote down, that's fine. If you don't think that is a reasonable doubt in itself --

McDermott does the same thing. He takes Mallory out of two different conversations that he initially tells the government. One was he said that in sum and substance in part that he overheard Gotti and J-Mark talking about robbing Joker's place weeks before it happened. This is T5, Thomas Exhibit T5. Then he denied it at trial. He denied even saying it at trial.

Also, that he had a meeting on July 18, 2012 where McDermott stated in sum and substance and in part that the morning after Joker was killed, McDermott overheard Gotti talking with Gotti and J-Mark with about the night before -- I'm sorry overheard Gucci talking about Gotti and J-Mark about the night before.

But when he's here he takes Mallory out of it entirely. Why do you think that is? What do you think the deals are among them about who's going to take the fall for

what they have done? How they are going to get their deals? How they are going to walk out?

Credibility.

You have witnesses -- I am talking about the cooperating witnesses -- with a history of criminal activity, extensive, violent criminal activity, a history of lying, a history of persistent drug use. We don't have a baseline for them as to what it's done to their memory, what it did to their perception at the time that events occurred that they are now claiming that they saw, that they heard, that they claim they remember. They even have a history of crimes and lying while they are cooperating. They have a history really of doing anything.

The government talked about their demeanor. I think the government had to because their demeanor was so inappropriate. They were surly, they were sullen, they were at times combative, they were at times unintelligible. Some of you have sat on juries before can compare them to other witnesses, and other witnesses at trial here. Compare them to Mr. Boone: Long pauses for simple questions.

Incentives. Mr. McDermott, you heard staying in this country is a matter of life and death for him, for what he fears he faces back in Jamaica.

Danielle Williams, 80-year mandatory minimum, and her three kids.

Mr. Mallory, seven-year mandatory minimum sentence. Baynes, a 17-year sentence. Incentives to try to be valuable to the government in this case so that they can reduce their own punishment substantially.

They are all talking about time served here. Think about it. The government says these are not upstanding citizens and you have to take your witnesses as you find them. True enough. But if you rely on a parade of lifetime liars, what do you think you are going to get today? Anything different?

They all knew it was in their best interest to tell the truth from the beginning. They all knew it was in their best interest not to commit crimes while they were cooperating. They did it anyway, even though it's in their best interest to tell the truth here. They don't think so.

They think so, because they are lawyers and they work for the government, and they have a job to do.

MR. NAWADAY: Objection. "Work for the government."

MR. DRATEL: No, I'm saying the prosecutors. I just meant the prosecutors.

THE COURT: Overruled.

MR. DRATEL: I was pointing.

The prosecutors work for the government and they have a job to do. Their job is getting out.

They have always thought differently about what their

best interests are their whole lives. They don't see the truth as their best interest. Truth is a random act for them, fortuitous perhaps, it just coincides with their interests. They have never done it. Even when they knew that cooperation agreements were in jeopardy they lied and committed crimes.

They changed their stories dramatically over time. We'll go into that a little bit, too. We'll start with Baynes.

Mr. Buchwald opened and talked about Perry Mason and realized that perhaps no one on the jury is old enough to have seen Perry Mason. I'm old enough to have seen it on reruns when I was a kid, not the original. But Mr. Buchwald had a Perry Mason moment here when he talks about something so dramatic that it really dispenses with the person's testimony categorically, which is that Mallory, musing in that way of liars, when did you hang out with Mr. Thomas --

MR. BUCHWALD: Baynes. It is not Mallory.

MR. DRATEL: When did Baynes hang out with Mr. Thomas. I'm sorry. Mr. Baynes. Asking Mr. Baynes, when did you hang out with Mr. Thomas? 2008 a little bit, a couple of times a week; 2009, a couple of times a week.

OK. Mr. Thomas was in jail the entire period of time. He couldn't have been hanging out with Mr. Baynes.

Look at T1. That's the stipulation read yesterday. Mr. Thomas was incarcerated either in Orange County jail in Goshen, New York, or in other New York State prison facilities

in Upstate New York from March 16, 2008 through and including September 14, 2010 except for three days in March of 2010. Then he was back in jail in February 2011 through the end of 2012 on the gun charge.

That's what happens when you don't live it, when you make it up. Those kinds of details you get caught on. Mr. Baynes was caught flatfooted.

Now if you look at Whitaker F, that is another stipulation. Mr. Baynes does not put Mr. Thomas in 54 Chambers when he first starts talking to the government in May of 2011. He says, I thought Bash was the shooter. I thought Bash did it. That is in the stipulation. He also said that he thought the other person at the robbery who he didn't know was an 18 or 19-year-old.

(Continued on next page)

MR. DRATEL: (Continuing) Baynes also acknowledged that he knows that Mr. Thomas appears older than Baynes. So it can't be an 18- or 19-year-old. That's in T3. That's Thomas' stipulation.

Baynes also said he knew someone as G. He described as a dark, skinny teenager an 18- or 19-year-old from the Heights. That's the same person. That's at 801 and 802 of the transcript. By the way, Mr. Mallory, in his phone contact, he said that was someone named G-Mo. Not Mr. Thomas.

Mr. Baynes initially said everyone had guns before they left for the robbery. Then he changed the story and said I didn't have a gun. I never had a gun. But, T3, before he went to Crown Fried, and he was referring here to everyone who had arrived at the Dubois Street address except for Baynes and Quay Quay, he said everyone had guns. If you look at Whitaker C, Baynes said Bash and Baby E planned the robbery. That was his initial story. But all these things change over time.

Baynes had to have had a gun at Chambers despite his denial. He had to have had a gun. How do you know? Because both Mr. Smith and Mr. Boone said that the person who helped -- because the person who Mr. Smith stabbed had a gun. And we know that Baynes was the person stabbed at 54 Chambers; that he was the person helping the robber who was wrestling with Mr. Boone. And that person had a gun. He hit Mr. Boone over the head with the gun. 1598, 1797.

Boone even mentioned that it was a chrome gun. He saw it twice. Outside initially and the gun that hit him on the head inside when he's fighting with the robber trying to get the weapon. The dude with the chrome gun hit him while he was wrestling with the robber.

Even Baynes on direct said he was the one who was trying to grab the guy who was wrestling with the robber.

Baynes also on direct said that L-1 called someone for a gun and then later a lady showed up and left a purse in a mailbox. Nothing about going somewhere else to get the guns. The guns were brought to L-1.

Mr. Baynes also testified that three people were robbed in front of Chambers before they even got inside. You heard Mr. Boone make the comparison. Who do you believe, Mr. Boone or Mr. Baynes? It's really not a contest, is it?

Ms. Morreale also, she never saw people get robbed in front. She's watching out her window. He claims that he and Quay Quay stayed by the door, Baynes does. Again, contradicted by all of the independent evidence.

Now who was at 54 Chambers? Again, we don't have to prove that. But the government has to prove it. The government hasn't proved at all that Mr. Thomas was there. You have Bash, you have Baby, you have Baynes, you have Stacks, according to Mallory. I don't know why L-1 is not included in there. Talk about a heavyset guy, an older guy. He's casing

the joint a couple hours before at Ms. Morreale's house. He's the boss. If you look at T3 Mallory says the older guy. At least Baynes said that Mallory told him that. Gangsta Lou, someone we heard about. Snelly. It's easy even to get to seven without Mr. Thomas. Whether there were four or five or even seven.

Mr. Baynes testified initially early on that he lied because he didn't want to do to jail. Really, nothing's changed. He doesn't want to go to jail. He'll do anything. He doesn't want to stay in jail at this point. He wants to get out. And the government will get up and say but he has to tell the truth to get out. We'll talk about telling the truth and keeping your deal.

By the way, Mr. Baynes is someone who has a history of robbing drug dealers, has a history of drug abuse. Five joints a day he averaged.

Now, Daniel Williams we'll dispense with rather quickly because I don't think she's significant in the context of Mr. Thomas. She doesn't say he sold any drugs. She doesn't put any drugs in his hands. Listened to that testimony very carefully. And she has him hanging out again during the 2008 2009 period. Oops. He's in prison.

Her information is clearly derivative of others. She was on the street. She's picking up information. She picks up information in the prison. She claims she met Mr. Thompson

2009, maybe 2008. Impossible. Another Perry Mason moment. I can't take credit for it. The government brought that out on redirect.

Also when she said "I see Gucci." She stood up here and said "I see Gucci over there." Interesting. Because when she was shown a photo of Mr. Thomas back in 2012, October 2012, shown a photo of him -- this is T6, another stipulation we put in yesterday -- she identified him as someone she recognized and had seen before but said I don't know his name. But she comes in here and has the audacity to make it seem to you that she knows him, that she knows his family, information she can pick up off the streets of Newburgh in five minutes.

She had been an informant, picking up information for the police for a year. This is her job. Eighty year mandatory minimum sentence. What do you think she's capable of doing to get out from under that. She, again, with an extensive criminal history, extensive drug use, ripped off her own sister with cancer. Her respect for the judicial process. Her concept of truth being in her best interests. She's gamed the system over and over again. She's played both sides. She was an informant leading a criminal lifestyle at the same time. She destroyed evidence of a murder. She was aware of the negative consequences it could have for her relationship with the police. She did it anyway. She was aware what lying could have as a negative consequence for her cooperation agreement.

But you know what? She did it anyway. Here. She intimidated a witness. And she was caught again. She signed another cooperation agreement. Just plan B, plan B.

Same is true with Mallory. That's a guy with a history of armed robberies of drug dealers. Do you think he was really home that night when they were robbing the drug spot? Nine different robberies. I think seven of them are drug dealers. Six armed. This is a guy who shoots at people. His drug history, PCP, marijuana, on a regular, regular basis. Think about the ability to perceive and the ability to remember, leaving aside the deliberate lying.

This is a guy who tested positive -- the day he pleaded guilty he tested positive for PCP and marijuana. The magistrate judge said okay we understand you're going to test positive today but stay away from drugs from now on. So ten days later, PCP, positive; marijuana, positive. And if that wasn't enough, he added cocaine in the interim too. So he tested positive now for cocaine as well. This is a guy who understands what's in his best interests? No.

He knew that it was in his best interests to tell everything that he did so it could be covered in his cooperation agreement, so he couldn't be prosecuted for it afterwards. He knew it was in his best interests to make complete disclosure about what happened to Mr. Henry because otherwise he could lose his deal. He knew it was in his best

interests not to continue to use drugs because if he tested positive he could lose his deal. And he went to jail for it. They let him get out on bail without even a dollar of security.

He knew it was in his best interests once he was cooperating not to commit more crimes on the street. He knew that was in his best interests. He knew that was going to jeopardize his deal. He did them all anyway. Just like he lied here. Even though, on an objective level, it was in his best interests to tell the truth. He doesn't think that. That's not the way he thinks. That's not the way he's lived his life.

Let's talk about his testimony. And in a stipulation that we put in yesterday I think at some point during his testimony he said that Mr. Thomas had told him the night after that Mr. Thomas comes back, he claims that Mr. Thomas comes back the night after; the night of the 15th or the morning of the 16th, after midnight, on December 2010 and tells him that Mr. Thomas says that Mr. Thomas had peeled off on Lander Street to go home. So let's look at the pole camera video, if we might, please, from -- this is camera two on the corner. This is an exit essentially from 54 Chambers. If we could run it for a few seconds. Starting at 24:51.

(Video recording played)

See that person going on the left. And everybody else going up First Street. This is First Street. That's Lander.

Now, let's look at the camera five, first east. Starting at about 24:52.

(Video recording played)

That left turn onto Lander, the only problem with Mr. Mallory's story is it's the wrong direction. There's a stipulation, T2, establishes Mr. Thomas lives in the opposite direction on Lander.

Now, he had seen the video already by the time he told the government that because he doesn't tell the government that until 2014, Mr. Mallory. So he's trying to create evidence here.

You can look at Officer Lahar's testimony, Government Exhibit 251, as well as the stipulation about the directions on Lander, where 138 Lander is, which is where Mr. Thomas lived.

Now, Mr. Mallory's memory, it's not really a memory. It's just self-generated because somehow it took him 18 months rather -- rather 18 months after the events. He can't remember certain things that should be remembered by someone involved at that level, like whether he gave the gun or Kev Gotti, Mr. Burden gave the gun. First he has -- his hands are off it completely. It's all Gotti. And he says he didn't remember. Then all of a sudden it changes again in 2014.

Now he doesn't remember that. He doesn't remember -- even within a month of this trial he doesn't -- claims not to remember whether it was a text or a phonecall he got from L-1

that night. He doesn't remember whether he or Kev Gotti gave the gun. He doesn't remember when people came back and shot out the window. He doesn't remember whether that was before or after. None of that he remembers. But somehow he remembers fifteen months after the event that Mr. Thomas is wearing a white scarf. Maybe he got that off the video too.

On the 14th of December 2010 he's involved in a marathon smoking and drinking session, Mr. Mallory is, with Mr. Burden. Mr. Burden, who the government said yesterday, Mr. Mallory hated cooperating against. Just hated. He probably hated it just as much when he taped him for two hours to get him to make all these incriminating admissions. Probably hated it just as much when he shot him in the foot. I'm sure he hated it.

This is a guy, Mallory, is really capable of anything. And he's proved it over and over again in his life. No matter how cold, no matter what it takes. His objective, pretty clear. He shot at people because he had an idea that they were responsible for shooting at him. That was the level of proof he had. He had an idea. Do you think he has a problem throwing Mr. Thomas under the bus in this case?

Let's look at some other things that he changed his story on, Mr. Mallory. He comes here and says -- talks about -- starting in the middle of 2014 all of a sudden now Mr. Thomas has come back to him the next day. He doesn't talk

about that conversation, that meeting afterwards until 2014 is when he first brings this up. And he says that he came back with the .38. But he had previously said he never saw those guns again. He talks about the other gun coming back at -- on the tape itself Mr. Burden says I never saw that chrome again. That's in section one -- excerpt one that the government played during trial.

Again, Mallory can't say whether Kevin Burden shot the gun out the window to test it a few days before or a few days after.

Reasonable doubt. All you need is one.

He says Mr. Thomas came back the next day to try to get rid of the gun, looking for L-1. It's as if L-1 can't be found. Everybody seems to find L-1 all the time. That's a preposterous explanation for a meeting that never occurred.

This is a -- Mr. Mallory, this is a flawless liar, with a history of lying. He has been, for most of his life undetectable. Think about him out on the street playing both sides flawlessly. Think about him with his friends, taping them down. They spent a lot more time with him than you have. They know his tells a lot better than we do. Undetectable. Cross-examination helps. But it only helps to a degree. But it gives you reasonable doubt.

Now, the Mallory tape that Mr. Burden. Again, feeds him all the information. Feeds him the chrome .38. Feeds him

who was involved in the homicide. He feeds him all that information to get it back from the hapless Mr. Burden.

Who knows what Mr. Burden would have answered if allowed to? Mr. Mallory couldn't take the chance of letting Mr. Burden answer independently. He had to give him those names. That's corroboration somehow?

Mr. Burden at one point says everybody came up in a cab. But I thought it was just two people came, Mr. Thomas and Mr. Whitaker. The stories don't match. The details don't match. Small details should match. They don't.

Again, Mr. Burden says he never saw the chrome .38 again.

There's nothing from Mr. Burden about the December 15 -- supposedly the posthomicide meetings with Mr. Thomas back at 260 First Street. Do you think if it occurred Mr. Mallory would have talked about that too? Or Mr. Thomas trying to return the gun?

Some other things about Mr. Mallory. That he blamed L-1 initially in his -- in his conversations with the government for shooting Mr. Burden he blamed L-1. He's quite capable of putting the blame on others without any basis. And he layered with all sorts of detail. He's sitting there. We have it during cross. You can see it in the transcript. He was there with a three-year-old. He heard shots. He saw holes in the wall. Complete fabrication. It's not until 2014 that

the truth comes out. That he shot Mr. Burden.

He says he turned himself in. Remember, first thing -- well, then, I turned myself. Turned myself in? He tested positive and they revoked his bail. Do you think he thought maybe that he won't get caught in a lie? That -- it doesn't register with people like him that the truth matters.

Kept committing crimes while he was cooperating. Robberies. Attempted burglary. Drug use. He said I didn't disclose it because I didn't want to lose my deal. That's what he said on the stand.

So if he's willing to commit crimes not to lose his deal, do you think he's willing to lie because he perceives that's how not to lose his deal, even though the opposite might be true on an objective level. This is not an objective determination by these witnesses.

A month before the trial June 26, 2014 he's claiming it's a text, not a phonecall. He's making the excuse: L-1 hid my phone. He says his phone couldn't accept calls.

He talks about on the stand, Mr. Thomas, he says definitively, he's a Blood. Yet in January of 2012 his very first session cooperating, it's in evidence as Defendant Thomas' M, it's a photo of Mr. Thomas with Mr. Mallory's handwriting on it. It says "If blood."

"If Blood." Did you hear that kind of equivocation or hesitation when he answered it on direct? No. Why? Because

he's lying and he thinks he can get away it; not just with you, but with them

You know what, he was pretty good at it, for most of the time, and he's continued to be good at it because he still has his deal.

Don't be distracted by this Bloods evidence. That's not what this case is about. It's not the conspiracy. This is finite. This is a piece in time.

And also with respect to Mr. Thomas. You heard a lot about formal Blood stuff inductions and all the other things that Mr. Mallory -- nothing about that with Mr. Thomas. Nothing. You heard he was a Crip.

Now, Mr. Mallory's deal. Seventeen year mandatory minimum if he doesn't get his deal. But he can go all the way down to time served. That's the objective. He says they're going to rip up my deal if I lie here. Well, he committed two robberies and an attempted burglary. They found out about it after he signed. He's supposed to have disclosed. That's a condition of his deal. Ripped up? No. Tested positive for drugs right after. Supposed to not commit anymore crimes. Ripped his deal? No.

He didn't volunteer this stuff. He was confronted by the government about the two robberies and the burglary. He didn't voluntary. He didn't say, by the way, I left some stuff out, I'm going to come clean. Ripped up his deal? No

Changed his story dramatically. Comes up with things in 2014 about Mr. Thomas coming back with the drugs. Oh, yes I gave him one of the guns. Did they say, hey, you lied to us? No. Ripped up his deal? No.

He robbed people. They didn't rip up his deal.

It's been two years since the government learned in November 2012 about the other robberies and the drug use. Deal is still there. You saw it. It's on paper. You saw the signatures.

He violated two of the three fundamentals of his cooperation agreement. Tell everything. Don't commit more crimes. The third one is testify. For him that's the one that's going to take him home.

What's the lesson, by the way, if someone does what he did and keeps his cooperation agreement? What do you think the lesson is about telling the truth here in court? That it's necessary? For someone like him?

He is a survivor with a long and violate criminal history. He says on the tape. "I'm hustle not muscle." He's both. And with a bias against Mr. Thomas. He says Mr. Thomas robbed him twice. You think this is not some payback?

Talked about his relationship to the government in 2012. If February of 2012 when asked about his relationship with Mr. Thomas. And by the way on the stand he didn't say they were friends. He resisted that. He talked about it with

Mr. Thomas. He said, yeah, I know his brother. We grew up together. I've stayed at his house. Left out the fact that two weeks earlier Mr. Thomas' sister had had his child. Left that out. Ask yourself why.

Think of what he did to Mr. Burden. Close friend. Fellow Blood. Taped him to incriminate him. Shot him in the leg. And he likes Mr. Burden. He does not like Mr. Thomas.

Then Mr. McDermott, again. He said he agreed it's a matter of life and death for him. To stay in this country. Now, when he's arrested on the robbery, he admitted, he knew it was trouble. He knew it would jeopardize his ability to stay in the United States. He knew the stakes.

This is January 31, 2011. The murder occurred six weeks earlier. Do you think if he had witnessed all this stuff he would say, hey, I got stuff to trade? I can be valuable to you. I know stuff about this murder that everyone wants to know about because it's big news on the streets of Newburgh, as you can tell.

Does he do that? No. It's only after he spent some time in Orange County jail talking to Baynes, talking to Mallory -- he talks to Mallory later but talking to Baynes, talking to others in the Orange County jail. Then all of a sudden, a year later, in January of 2012 the same time that Mallory begins cooperating, all of a sudden Mr. McDermott comes forward to the prosecutors and says: Hey, I've got stuff to

trade. But he does meet up with Mallory at GEO. And then all of a sudden Mallory vanishes from those conversations. And Mr. McDermott talks about it.

There's a certain illogic in Mr. McDermott's testimony as well. Not just in the fact that it was created later. But he says that he -- when asked by the government about this claim of overhearing a conversation between Mr. Burden and Mr. Thomas the day after the Henry homicide, he's asked: Did they know that you were overhearing it? He says no. But then somehow later he gets shot at by someone, Snelly, apparently allegedly shoots at him to keep him quiet. Why? When no one knew he was overhearing? Why does Gotti warn him later, Burden, according to his direct testimony, why does Gotti warn him later if nobody knew he was overhearing it? Doesn't make sense. Does doesn't match an important detail that is the hallmark of candor.

Also, Burden lived downstairs. Mallory lived upstairs. They're having conversation with Mr. Thomas. They know how to get privacy if it's an important conversation about a homicide. They don't have to have it out in the open where people can overhear it.

The Court is going to give you an instruction about cooperating witnesses. Listen to it carefully. You'll be able to have it read to you. You may have it with you in the jury room when you deliberate. I'm not going to invade the Court's

province and tell you what it is. It's also legalistic language. I think it's better if you're reading it when you're hearing it at the same time. It's more understandable

That's the testimony of the cooperators. Where does it match? Where does anybody say the same thing about anything? Because it's all self-generated, generated through their illusion

The government talked about corroboration. Remember all those words I talked about at the beginning. The government said corroboration.

Okay. They had Mallory corroborating himself in the closing argument. Where's the corroboration? So let's ask these questions, these important questions about Mr. Thomas and the case against Mr. Thomas.

Where's the corroboration for Mr. Thomas getting a .38 from Mr. Mallory the night of the homicide? Corroboration is nothing.

Where is the corroboration for Mr. Thomas coming back the next night with the gun to meet with Mr. Mallory? Corroboration is nothing.

Where is the corroboration of Mr. Thomas rather than someone on a video who you can't recognize wearing a white scarf? Nothing. There is no evidence he even owned a white scarf much less wore one that night. Do you think you could find testimony about a white scarf from someone in the entire

City of Newburgh?

Mr. McDermott's testimony about Mr. Thomas coming back the next day, midday. He was clear. He said it was midday. Where's the corroboration for that? Nothing. Not even from Mr. Mallory, doesn't even corroborate that. No corroboration.

By the way, how many times do you have to come back to 260 First Street after the robbery? It's ridiculous. Everybody just wants him back because they want to create this story.

Where's the corroboration for Mr. Thomas being at 54 Chambers at all that entire evening? Nothing.

They can't corroborate each other with different stories about different events. There is no corroboration for the essentials of the government's case against Mr. Thomas.

Talk a little bit about the other counts now. Kind of grouped together in a certain way. One, Two, Four, and Five is really about the robbery homicide and use the gun and the homicide itself. Three and Six are about a separate drug conspiracy that's been charged. Let's talk about that.

The length of these conspiracies, the robbery conspiracy and the drug conspiracy, Mr. Thomas, as I noted is in jail for almost the entire period of both conspiracies. Before and after.

Let's talk about the drug conspiracy. You heard the testimony. There is no organization involved in drug dealing

in Newburgh. You do your thing. I'll do my thing. You may do your thing fifteen feet away from me and I'll do my thing and occasionally we swap out something. Whole group of separate sellers. Not a conspiracy. Mr. Mallory didn't have partners, didn't share profits. None of that.

The court is going to instruct you on conspiracy, something called multiple conspiracies as well. Listen carefully. See how it applies to this case.

This conspiracy is not the whole City of Newburgh. They have to prove to you an agreement among people to do something illegal. Not haphazard, sporadic, isolated events.

Experienced Newburgh cops. You heard thousands of arrests. The Lahars. Were they familiar with Mr. Thomas? No. They watched these open-air drug marts, surveilling. They weren't familiar with Mr. Thomas out there. Because he wasn't involved in a conspiracy to sell drugs.

Mr. McDermott said he never saw Mr. Thomas selling crack. Nothing from Danielle Williams either about that. No sales. No surveillance. No nothing. Except for an ancient one in 2007 that, again, is not part of this conspiracy.

Mr. Mallory testified that Mr. Thomas would ask for money, to borrow money and then Mr. Mallory would give him crack to sell instead. First, corroboration? Zero. Second is, even if that's the case, I submit to you that's not conspiracy to sell narcotics as alleged in the indictment.

Robbery conspiracy. You heard from the officers. You heard from Mallory that Mr. Thomas' arrest in 2011, even though it was a robbery call, was a separate incident not involving him. Nothing to do with him. There is no conspiracy to rob. Really the only thing at issue is the Henry homicide and the robbery that went along with it. And we've talked about that.

That weapon, again, inoperable. A generic description of six black men in dark clothing. Nothing about Mr. Thomas.

Talk about guns. Mr. Thomas with a gun. If he always had the gun, why would he need one from Mr. Mallory on the 14th? The only thing that anybody has with it is a .22 that's not operable. That's the only gun that's put in his hand in the entire case.

Certainly can't find that for Count Four, which is the Henry homicide. Nothing even alleges that that weapon is involved.

Again, listen to the instructions. Possession versus what it takes to actually be guilty of a firearms offense as charged in this case.

Come back to common sense and life experience which each of you have. Apply it.

The government said something yesterday that I agree with. Don't go numb. I agree. I have a different take on it. Jeffrey Henry was murdered. That is a terrible thing. Violence is terrible. Newburgh sounds like a place where

there's too much of it. Too much crime. Too much drug use. Too much drug selling. Too much Bloods influence and activity. Too much of all of that.

Don't go numb, throw up your hands, and say someone has to pay for Jeffrey Henry's murder. And all you've got to fulfill that is Mr. Thomas. Don't do that. Don't go numb from this.

Don't go numb about the conditions in Newburgh, that you take it out on Mr. Thomas because he's the only person, as far as I'm concerned, here for you to do that. He's a real person too. Don't forget that.

Don't go numb. The consequences for him are as important and life-changing as anyone can face.

The evidence is what counts. Not the emotion, legitimate emotion that wants to hold someone, anyone accountable for Jeffrey Henry, for Newburgh, for the whole mess. Two wrongs do not make a right here. Do not convict someone who did not commit a crime.

The judge will instruct you about reasonable doubt. Take the judge's instruction, obviously, if it's any different than what I'm saying. But it's a doubt that would reasonably cause a prudent person to hesitate in acting in matters of importance in his or her own affairs. Think about that. Something that makes you hesitate before acting in a matter of importance in your affairs. Think of it in your loved ones

too. Sometimes we're maybe more incautious, less cautious with ourselves than we are for those we care about. Think about that one too for your loved ones.

There are many reasonable doubts. There are a lot of reasonable doubts in this case. You only need one. I'm not going to go back through all of them

I just want to talk about the cooperators a little bit in terms of reasonable doubt and acting at something important in your own life or the life of a loved one. If you were in a dark room with the curtains drawn, closed and Mallory or Baynes, and you had something you were wearing, something that was an outfit that you didn't want to get ruined. And you said is it raining outside? And they said no, it's not raining. Mallory said no, it's not raining. You would go draw back those curtains and check even on something of that little importance. And if Baynes said no, no, no, he's right, it's not raining, you'd still go. You could throw in Williams. You could throw in McDermott. You'd still go check

Imagine if it was something really important. What if you needed -- what if you had a condition and you went to a doctor, Dr. Mallory, and he said you need surgery and it was Jamar Mallory. Would you get a second opinion? And if the second opinion was from Baynes, you'd get a third opinion. You would not trust these people in something of importance in your life. Throw in McDermott. Throw in Williams. You'd want a

fifth opinion. There's a reasonable doubt as to each of them and all of them.

Would you want to be judged on the basis of their testimony? Would you want a loved one to be judged on the basis of their testimony?

I won't be able to speak to you again. So I've tried to anticipate some of the arguments the government will make in rebuttal. I won't have the opportunity to respond. But I'm asking you to do that for yourselves, for the integrity of this critically important process that we're in. Not just for Mr. Thomas but to the whole system of justice we have, so that when you hear the government's arguments in rebuttal, test them against the evidence. Test them against the lack of evidence. The lack of corroboration. The lack of credibility. The lack of consistency. Test them against your common sense and your life experience. And ask yourself and ask the government the hard questions to yourself and in the jury room, whether the government has proved this case, each element of each offense against Mr. Thomas beyond a reasonable doubt.

As I mentioned, consider this as carefully as you need to. Because everything is available to you, exhibits, testimony, jury instructions. Use your common sense in recognizing what's accurate and what's not, what's true and what's not, what's reliable and what's not, what makes sense and what's not. I submit to you that when you've done that you

cannot determine beyond a reasonable doubt that Mr. Thomas committed any of the crimes that he's charged with here. I submit to you the only verdict that the evidence compels is that Mr. Thomas is not guilty on each and every count.

Thank you.

THE COURT: Thank you, Mr. Dratel.

Ladies and gentlemen, let's take our morning break. It's 40 after. So please be in the jury room no later than 10:55?

(Jury excused)

(Continued on next page)

(In open court)

THE COURT: You can be seated. Nothing for me?

MR. NAWADAY: Your Honor, can we just confirm timing. Will the government be after lunch or are we going to try to push through?

THE COURT: Well if Mr. Greenfield is correct I think we'll go about an hour and 45 minutes or so, give or take, and we'll break for lunch.

MR. NAWADAY: Thank you.

THE COURT: We'll break for lunch in any event.

(Recess)

THE COURT: We're going to get the jury.

MR. BAUER: One question. You're going to send the exhibits back -- not the guns and drugs?

THE COURT: Correct.

MR. BAUER: So not physical evidence? All those bags of clothes?

THE COURT: No. None of the bloody clothes. None of the swabs. Only documents. Pictures, documents.

MR. BAUER: We were going to prepare a modified exhibit list, the one that we've been using, but delete all of the entries for the things that weren't admitted.

THE COURT: That's fine.

MR. BUCHWALD: If I can just, in that respect, there are a few of your exhibits that are misidentified. There are

things that you called projectiles instead of casings. You remember a few of those?

MR. BAUER: Why don't we talk about it outside of the --

THE COURT: We won't be giving them that until after lunch so maybe you guys can figure all that out after lunch.

Let's get the jury.

(Continued on next page)

(Jury present)

THE COURT: Everyone please be seated.

On behalf of Mr. Christian, Mr. Greenfield.

MR. GREENFIELD: Thank you, Judge.

Members of the Jury, as you know I represent Raymond Christian and I'm here to present our closing arguments during the course of this case to you. I want to make an assurance or two before I begin my presentation to you. I will make every effort during the course of my comments to you to be true to the record, which you now are aware of, every word that's been said during the course of the trial has been reduced to writing. I will be true to that record. I will make, hopefully, reasonable arguments to you.

I ask you to do this. If you agree what I'm saying, write it down and argue it for me, or more importantly for Mr. Christian, when you go back into the jury room because this is the last chance that I'm going to have to speak with you. And I'm not going to be able to rebut whatever the government says in their reply summation. So, please, take notes. Make points if you thought I made a significant or important point, make a note of it.

I'd like to start right at the heart of the government's case and that is Raymond Christian is accused of being present at 54 Chambers Street during the course of a robbery on December 15, 2010. And the accuser is Anthony

Baynes. Let's look at what was said.

The government said it was an overwhelming case. Let's examine an overwhelming case. Baynes testifies that as he is walking back or to the scene at 54 Chambers Street he sees five men on the street being "his friends" with masks on and three men being robbed. One of the victims of the robbery, alleged robbery, was Akinto Boone. He said I wasn't robbed.

I asked him a couple or three times. I think the third time he said what the hell is wrong with you, I wasn't robbed.

And there was another witness to this alleged robbery. Looking out a window from across the street is Barbara Morreale. She didn't say she saw a robbery. So right away you have to ask yourself what was the government talking about yesterday when they said they had an overwhelming case against Raymond Christian? What is overwhelming about the fact that a key witness against my client is saying something that never happened, and he said it under oath.

Was he mistaken? Was he confused? Or was he the L-word, lying?

Then he said that he was assigned the role of a lookout. He was assigned the role of lookout across the street facing toward the door at 54 Chambers Street. And then came a time when he was so curious about what might be happening at 54 Chambers Street he crosses the street and he starts peering in

the door. And alas, he sees Raymond Christian being set upon by somebody in the apartment and that they're wrestling for a gun.

What did Barbara Morreale say about that? She was looking out her window at the same time. She was concentrating on that door.

What did she see? She didn't see any two lookouts crossing the street, two kids peering in the door, two kids with curiosity looking in the door. Neither one masked. Neither one with a gun.

All she said she saw was Joker with his arm -- hand on the door leaning in, one leg against the door, and the telephone in his hand. Never once did she say she saw two kids peering in the door.

Proof beyond a reasonable doubt? Or is the witness mistaken again? Was he confused? Was he just making it up as he was going along?

The next thing that happens in the apartment. Baynes says he sees Raymond Christian wrestling for a gun with a man in the apartment; that the man he was wrestling with was about the same size as Mr. Christian. That's what Baynes says.

What do the witnesses inside the apartment say? People in the apartment say the first one is Tarrence Smith. He was near the bedroom and he saw four masked men come in; that they were -- at one point Akinto Boone was going toward

the bathroom and at another point Akinto Boone comes out of the bathroom and he's wrestling with a man for a gun.

(Continued on next page)

That he went to Akinto Boone's aid and I stabbed him twice in the side. If that is Raymond Christian who was fighting for a gun with Akinto Boone, he certainly didn't bleed out of his side.

Who was bleeding in that apartment that day?

Baynes. That is who was bleeding in the apartment. So he wasn't wrestling Raymond Christian for a gun. He was wrestling the masked, armed Anthony Baynes.

You have heard talk about the DNA. I will establish for you beyond any doubt that that DNA that was in that mask on that day was not, not inconsistent with the DNA of Quay Quay Boykin, his brother.

It's not forty hundred gazillion to one that it was his DNA. It's almost one to one that neither is inconsistent with the other, and each of them could have worn that mask in that apartment on that day.

We will get to that later. The first part of my presentation to you is what happened that day and under what circumstances did it happen. Why would Baynes come to you, get on that witness stand, and say that he went to the aid of Raymond Christian in the apartment that day?

We will get to that in a few moments. But Akinto Boone certainly corroborates what Tarrence Smith said. He was fighting a guy for a gun. He wasn't watching what was going on around him, but clearly somebody got stabbed and it all

happened in the kitchen area.

What does the government's star witness say, Mr. Baynes?

He and Quay Quay were outside. He and Quay Quay were not wearing masks. He and Quay Quay were unarmed. They entered the apartment unarmed and without masks, which neither of the two witnesses, Boone or Smith, say happened, that everybody was armed is what they say, everybody had guns is what they say, and everybody was masked is what they say.

So it was proven through the testimony of Mr. Baynes and through Akinto Boone and through Tarrence Smith. Somebody got stabbed in that apartment and the person who got stabbed in that apartment was armed and masked.

Now it could be Raymond Christian who was stabbed. It could be Anthony Baynes who was stabbed. But we have corroboration of who was stabbed. That's real corroboration. Anthony Baynes bled like a pig in that apartment. His blood was all over that apartment. So we know who got stabbed, so we well may know who was fighting for the gun with Akinto Boone.

But the government says they have an overwhelming case. Don't be distracted by these nonissues that I'm raising. Am I raising a nonissue here, ladies and gentlemen, or am I talking about a sensible argument to you? If the man was fighting for a gun and he had a mask on and he bled, this man would have been in the hospital that night.

He was not the man in the hospital. The man in the hospital that night was Anthony Baynes. They consider their case a solid brick wall. I start with you are down the golden brick road whatever it was from Alice in Wonderland. It is a start. But let's see where we go.

Is Smith mistaken as to who he stabbed? He knows that he stabbed a guy and he stabbed him twice. He may not have seen the face, but he knows blood came out. Boone knows that he was fighting for a gun and some guy got stabbed. The guy he was fighting with had a gun and he also was wearing a mask. Why would Anthony Baynes deny wearing a mask, really deny wearing a mask and possesssing a gun? Because he created a role for himself. He created the role of being a lookout across the street with Quay Quay.

He said nobody saw these lookouts. These lookouts saw Baynes and no one else saw. Robberies of three grown men that no one else saw. Somebody peering through the door 54 Chambers Street that no one saw.

They are allegedly peering into 54 Chambers to see what is going on. Barbara Morreale told you that Joker was at the door trying to keep the people inside. It's not reconcilable. There is a reasonable doubt as to their story.

In their rebuttal summation have the government stand up before you, stand here and say this is how I reconcile that, and have them prove it to you beyond a reasonable doubt,

because that's the standard that the judge will provide you with during the course of his instruction.

Don't make a mistake about this. Baynes is the foundation of that brick wall that they say they produced for you. Baynes is not one brick of that wall. As far as Raymond Christian's case is concerned, Baynes is every brick in that wall.

Because without Baynes there is no testimony as to what occurred, how Raymond Christian was there, if he was there, and what happened with Raymond Christian during the course of that day and on other days. He is the case.

Again, put the DNA aside. I will address that toward the end of my summation. But put the DNA aside and ask yourself, without Baynes placing Raymond Christian in that apartment, what proof have they brought before you? I could tell you, other than two sentences out of Mallory's mouth that he was told something, zilch, nada, gornisht, nothing.

The government has told you that Tarrence Smith, Akinto Boone, and Barbara Morreale are bricks in that wall. You have to pull those bricks out, because they disagree with everything that Raymond Christian allegedly did, and they absolutely fly in the face of anything that Anthony Baynes said Raymond Christian did.

So it's either you accept the testimony of Terry Smith, Akinto Boone, and Barbara Morreale, or you disregard

their testimony and accept only the testimony of Anthony Baynes. You can't have it both ways tell the government. You can't say they were mistaken. You can't tell us, well, maybe he got something wrong. It is either he got stabbed in the apartment with a mask or a gun in his hand or it is all a lie.

I come down to -- there's that old joke, but it is important here. Who are you going to believe? Your lying eyes or the lying lips of Anthony Baynes?

This will be the most difficult part of my summation, getting this glove on. I am going to make a mitten out of it with your approval because I'll never get it on. Here we go, I have two mittens and a mask. All we need is a cold day.

Here we go. The government says this is a half mask maybe. Where does this become a half mask, ladies and gentlemen? You heard the testimony of Myers. He said he circled the inside of this mask from the top of the forehead to the bottom of the chin. Is that a half mask? Why does it need eye holes if it is a half mask? This is a full mask.

Baynes said my client was wearing a half mask that day. How do they reconcile that? Was he wrong about that also?

Now, I asked both Mr. Smith and Boone where the incident occurred, where the stabbing occurred, and actually at one point I had asked, I had shown another diagram of the apartment to Mr. Smith, I don't know if you recall this, and he

looked at it. He said, That is not the apartment. I said, It is a diagram drawn by the police department of Newburgh. Are you saying that is not your apartment?

Finally we got him one that he was happy with. This is the one. It's 259 in evidence. It's the government's exhibit.

Just to give you have a little background as to how this exhibit was drawn, there was a diagram created by the police department of Newburgh. You are going to see a whole bunch of names written down here. Among the names that are written here are Baby E, Reckless, Gucci, Quay Quay, Baynes, Bash, Jeffreys and Bow Wow.

I had asked Mr. Baynes where the stabbing occurred. And on the other diagram, which is back there -- if I can have it, the other diagram.

Thank you.

Mr. Baynes came down, stood here. He said this is where it happened, with the X and the X2 are written.

Then in the same area, or nearby, Mr. Smith after our little conversation that he was looking at the right diagram, said nearby was where it happened and Boone testified about the same, without looking at the mask.

But the importance of this, ladies and gentlemen, is that I had asked him if he had ever told anybody previous to this that the stabbing occurred somewhere else.

He said, Yeah.

I asked him, When?

He said when he spoke to Detective Cortez and an assistant district attorney from Orange County.

And I said, Where did you tell them the incident occurred?

And he said, About here, five or ten feet from the entranceway.

So if it occurred five or ten feet from the entranceway, he is now moving it deep into the apartment. On its face maybe he was wrong, but we know all the blood was here or most of the blood was there.

I asked him, Why would you change that?

He says because the detective told him he was wrong.

I asked him, Was the detective there on December 15, 2010?

He said, No.

I said, So why did you change your testimony and move it from the doorway all the way into the apartment?

He said because the detective told him so.

This is an independent witness. They want you to rely on who was told basically change your story because it matches up with the story of the two witnesses. They want you to rely on that unhesitatingly.

Again, who are you to believe and believe beyond a

reasonable doubt? Three independent witnesses, two of them victims and a woman who likes to look out her window at night. No interest in the outcome here, no desire to be favorable to one side or the other.

You've got three street witnesses who told you this is what happened, this is the way it happened, versus the word of Mr. Baynes or the lying lips of Mr. Baynes. You make that determination, but certainly it is not reconcilable. This is a short point, but I think important to discuss.

Detective Loscerbo questioned Anthony Baynes within an hour or two of the incident in St. Luke's Hospital on December 15, 2010, between 1 a.m. and 2 a.m. Anthony Baynes told Detective Loscerbo that four people were involved. It was Quay Quay, it was Baby E, it was Bash and it was he.

Baby E and Bash went inside, but he and Quay Quay stayed outside. That was basically two variations of the same story he told Detective Loscerbo. Detective Loscerbo leaves, and I guess Anthony Baynes started to think: I told them I was outside, but a lot of my blood is inside. So I guess I am going to have to come up with another story. So when the cops come I will make another story. It's easy.

So what's the story he tells when the cops come?

You know, it wasn't four of us. It was five of us. Raymond Christian was there, and I went inside to help him, and I got stabbed trying to help him. I wasn't wearing a mask. I

didn't have a gun, but I was in there trying to help them.

Is that true? We just went over what happened in there. Is that true or is it just the next story?

So he created a role for Raymond Christian, and he placed Raymond Christian inside the apartment and put himself outside the apartment.

The only problem is his blood was still inside the apartment. So he comes up with the stabbing story about coming to the aid of Raymond Christian. Well, again, Smith puts the lie to that story. Akinto Boone puts the lie to that story.

They say their case is overwhelming? They say don't be distracted by the arguments of the defense. What kind of distraction are the arguments I have made to you today? Is one of them unreasonable? Is one of them wrong?

You are not being distracted. I am telling you the way I see it happened. Let's go to what happened before the robbery and ultimate murder of Joker.

Baynes says the day starts at about noon; that he and his godbrother/friend, best friend Lou, leave his house and cross town to the vicinity of 54 Chambers and then he and Lou are checking spots.

Then along comes Quay Quay, along comes my client. Don't forget this is the next day that he's telling the story, but the important point is his best friend, this godbrother of his, Lou, is along checking out spots. Incidentally he was

asked the description of Lou and it was basically the description of my client, age, height, similar weight.

Some cross-examination and guess what, it turns out that his friend Lou, his godbrother, the guy he's with every day almost his whole life, and Quay Quay are a trio.

And his name really isn't Lou, his street name is Gangsta Lou and Gangsta Lou is walking around with he and Quay Quay checking out spots.

Then, for whatever reason, unexplained, that day, somewhere in the afternoon Gangsta Lou takes his leave, adieu, and walks out, never to be seen again.

I asked him, You said every day of your life or just about every day of your life you are with Gangsta Lou, your buddy, your godbrother? When is the last time you saw him that day? You haven't spoken to him since that day.

I haven't spoken to him that day. He went home. Baynes left the hospital, went home, and wasn't arrested for four months. And he didn't spend a day talking to Gangsta Lou. Or did Gangsta Lou head to spots unknown?

After they are walking around checking out spots, they end up hanging out on a porch somewhere near, on Dubois Street I think it was, and from there they go to a, I think he said to a restaurant of some kind. Then they went to his mother's house, and then he says they are trying to catch up with the guys in front of them, and that's when he sees the robberies

occur on the street. That's the date, December 14 into December 15, about a half hour into the 15th from the day, the hours he wakes up and hangs out with Gangsta Lou until the murder occurs.

After he gets stabbed, he says he goes to the home of Quay Quay, which also happens to be the home of my client. And who was home when he gets there? Quay Quay and Raymond's mother, Quay Quay and Raymond's grandmother, and Raymond.

Let me take a quick aside. The government showed you a series of letters that my client wrote to Baynes when he was incarcerated asking him to be loyal, to stand up, to try to help him.

The government wants you to read those letters as meaning he's guilty of something and he wants him to protect Raymond from any prosecution. That's what they want you to read those letters to mean. Now, Raymond is the older brother of Quay Quay. Raymond probably knows Quay Quay did something was involved in something that night, because they came home and one guy was bleeding.

You could read it the way the government wants you to read it, or you can read it, hey, don't hurt my brother. If I can, I'll help you, and I'll send you a few dollars. And he did.

What else did Baynes say? He said my client and he were involved in robberies, and there was always a word that he

would put in there: I was standing right next to him. We did two or three robberies, and every time I was standing right next to him when it happened?

The same thing when there were guns. I was standing right next to him when I saw the gun. I was standing right next to him when he put three shots into the air, maybe two, but three shots into the air.

We got him on that, ladies and gentlemen, and we got him good. You heard words of corroboration.

Well, look at this. This is the gun that Raymond Christian allegedly shot into the air that night. It is a two-shot Derringer. It can't fire three shots, but it can fire two shot.

You heard that Mr. Christian was arrested that night for possession of this gun, even though it was inoperable. But you know what. It had two bullets in it. The gun wasn't fired.

Then I went up to him. I said you shot -- you're sure you were there?

I was standing right next to him.

And how many shots did he put up?

I don't know, two or three. Let me think, two or three. Maybe two.

Because he knew it was a Derringer. It was loaded.

That's corroboration. They want you to believe this

guy. It had two bullets in it.

Overwhelming? You can rely on him unhesitatingly?

He's got an agreement with the government. Therefore, when Anthony Baynes gives his word, you can go to the bank on it. If you bumped into him on the street today, you probably would run the other way.

I mean, but putting that aside, if he came up to you and you didn't recognize him at first he said remember me, can you lend me 25 bucks, would you consider it? Would you take the chance of paying him a few dollars and expect to get paid back? Would you buy a used car from him?

The answer is no. Clearly no.

But his life, his existence, his freedom is worth a whole lot more than $25 or whatever a used car would be.

Mallory. Let me talk about him for a bit. He says on direct examination that on an unknown date in an unknown location with no one else there, Raymond Christian told him or said to him that he was involved in the incident, in the robbery murder.

What do you do with that? You've got a guy who isolates himself, he says I was alone, there was nobody else there. What was it, 2009. 2010. They all said the same thing. I mean, he could have been in school. The day he was arrested that could have happened, but what do we do with it?

You can't get behind those lies. When a person

isolates himself, when there's no one there, just the two of us, he said the following. That should not be acceptable to you as jurors.

Now I would like to address my attention, OK, to the DNA evidence.

First, one last piece. Mr. Mallory.

He was played a videotape. This is classic. And he said, Stop the videotape, and they stopped the videotape at 25 minutes and 9 seconds after the hour on December 15, 2010, Jamar Mallory told the government in -- what exhibit number is it?

MR. BAUER: It is not in evidence.

MR. GREENFIELD: It is not in evidence. He testified that he saw somebody who looked like my client because he recognized him by the way he was walking down the street on a videotape which was played for you. You couldn't make out a face. You couldn't even make out a color. He walked the way Raymond walked. It was likely him. Go to the bank on it.

Now I would like to go to the DNA. No issue that Raymond Christian's DNA is on the mask as a major contributor. But the questions for you, that you should have for the government of are these: How did it get there? When did it get there? Under what circumstances did it get there? Who was wearing the mask in 54 Chambers Street on December 15, 2010.

Why wasn't Quay Quay's blood compared to 3E, which is

the blood on the inside of the mask. Why wasn't the crime lab told that Laquavious Boykin, Quay Quay, was a half brother to my client?

These are significant questions. And I don't think the government answered any of them. This is what their expert forensic scientist, Myers, testified to.

There was a mixture of three DNAs on the mask, 3E, where they say the only spot in the whole crime scene with respect to my client is the inside of that mask that day and that it was a mixture of at least three people's DNA, the major source of it being attributable to Raymond Christian.

But DNA has very significant limitations. When DNA is left behind on an item like a mask or on a lectern, like I'm holding now, it's not time stamped. It doesn't say David Greenfield put his hands on the lectern at 11:35 a.m. on August 21, 2014. It says, his DNA is on the lectern. It could have been there for days, months or years, and Myers told you so.

It could have even been transferred from somewhere else to here. I sat at the table and I put my hands on the sides of the chair to get up. I came over here, maybe I put my hands here or didn't.

If somebody is going to sit in that chair sometime in the near future, they will get my DNA on their hands, and they are going to come here and they place it on the lectern, and my DNA will be on the lectern whether as a major contributor or a

minor contributor, but it will be here. So there is no time stamp and it lasts for a long time in the appropriate conditions.

Now this mask was seized by the police within hours. We know they didn't do the most appropriate thing with evidence. On some cases they decided to open up the evidence envelope and do a favor for the people up in Albany and take cuttings and swabs. They are totally untrained for it.

Myers told you it took him six months of training in the police lab to do it correctly, and Detective Frederick told you no big whoop. I had a four-hour course back in 2002. I can do it. 15 to 20 times in his career he did that.

In this case he did that. He admitted doing it with Baynes' clothing. You think he's going to get up there and say I did it with the mask?

Here's another point and a more significant point. The crime lab and the Newburgh Police Department failed to consider who the minor contributors might have been in the mixture of DNA. They had made the determination that my client was a major contributor, and therefore they never bothered to check to see if anybody else in the case might have been a contributor.

The police never bothered or the DA never bothered to tell the crime lab that Laquavious Boykin was my client's half brother. There is a known suspect to the police and the crime

lab, and they never bothered to check the DNA which they had of Laquavious Boykin's to the blood swab on 3E.

You heard him on the stand when I told him Boykin was the half brother of my client. He was surprised. He was taken aback. No one had ever told him.

My last question to him, it is on page 1113 of the transcript:

"Q. Assuming that Raymond Christian wore No. 3, which is the mask, the mask in evidence a number of times in the past --

"A. OK.

"Q. -- and that Laquavious Boykin took it and wore it one night, the night of the murder, would Laquavious Boykin still be a minor contributor to the mask?

"A. He could be."

So the odds now go from 400 gazillion or whatever they said the odds were to one, to Laquavious Boykin being a minor contributor, which we will go over in a bit, and never tested appropriately in the lab.

What are the odds now? You have one major and at least two minors. Three to one? Four to one? Six to one? That beyond a reasonable doubt they haven't explained why no one in the lab was told that Boykin was a half brother, why no one in the lab on its own decided to check Boykin, a known suspect, against 3E, why the police decided, whatever reason they decided it for, not to have comparisons done. No matter

what the reasons are, you can't put the burden on him.

You can't stick it on his back. The government has the burden. They told you that at least two times yesterday, and they dropped the ball, dropped the rock. However heavy that burden is, they dropped it.

Don't forget, on this, on this diagram, where Baynes and Quay Quay are standing, you know what was found at their feet? Right at their feet? The mask. Have Frederick's testimony read back to you where the mask was found.

On cross-examination I was asking forensic scientist Myers about where certain loci -- rather than talking about it without showing it to you, I think it is a better to do it this way. This is an extract from the March 4, 2011, police lab report on Laquavious Boykin's DNA.

You will see circled in red one, two, three, four, five, six, seven times what are called loci, or the singular for it is locus, that each of those loci on several occasions matched up with the blood in 3E seven different times.

The police lab has certain protocols, which means procedures that they must follow. These procedures are laid out, and they have been introduced in evidence by us for your perusal. But the one that I am referring to now is on the top, DNA Section D6.4. I'm referring to pages 7 and 8. Pages 7 and 8 talk about mixtures like we have here, mixtures of blood where you have major and minor contributors.

And the protocol on page 8 reads as follows: "When the minor component is attributable completely to an individual at six to nine loci and a plausible explanation can justify any missing alleles, the following conclusion can be reported."

And then the conclusion is there. You can put the name of the individual who is a minor contributor into your report, but it was never done here, because no one ever asked for it to be done.

If it had been done and there are seven loci identifiable, and you were told that by the witness Myers, then that name, Quay Quay, Laquavious Boykin should have appeared as a minor contributor.

I read to you before, and I'm not intending to read it again, but Myers told you as a minor contributor his DNA could have been on that mask. So that four gazillion quadrillion now to one or is it maybe one against one.

I can't overstate the importance of the failure of that Boykin blood being compared to 3E. The cops should have asked for it. The DA should have asked for it. The lab should have done it on its own if they were truly a lab that is not to do the work of the police but to independently decide the issues.

Maybe the lab does require it, but I don't think Myers was the energetic guy in the world. The last article that he read out of the journals was 2009. He takes eight hours of

mandatory scientific education a year. He went to a community college to learn statistics after he graduated from college. He's definitely not a member of the Swifton Committee for the Advancement of Forensic Science.

He's getting paid by a police lab to help police so we come full circle. Baynes' testimony puts him in the jackpot. I think I've exposed Baynes' testimony about his role.

The testimony of Myers takes him out of the jackpot. It's hard, a man died. But your job as jurors is not to avenge the death of the Joker. That is not your job. Your job as jurors is to decide whether the government, the United States of America has proved its allegations beyond a reasonable doubt. Require them when they come back up here and say, How did you do that? The DNA is not what you said. The DNA is one to one, one to two, one to three. Those aren't odds that I call beyond a reasonable doubt.

How do you want us to swallow the testimony of Baynes being a lookout peering into the door at the same time Joker is standing in front of the door and ultimately gets murdered. How do you reconcile that? You just accept it and let him go? How do you reconcile Smith and Boone? Smith and Boone saying what they said happened in the apartment, a masked man carrying a gun was stabbed. The lookout was unmasked and ungunned. It can't be.

I believe I said it, but I think it's worth saying

again. Baynes puts Raymond in the role of the guy fighting for the gun. Why does he do that? Because then he can explain the presence of his blood in the apartment. He got stabbed trying to save Raymond rather than being the armed gunman that Smith and Boone said he was. Plain and simple. Have them reconcile that beyond a reasonable doubt.

The wall that the government built for you, first of all, it is a computer-generated wall. Imagine if I would have had a Lego set at home. I could have built a wall for you if I came in today, if I showed you where you just take Baynes out of every piece of important evidence like I just said.

Baynes is only one brick in there. Baynes is the wall. The mortar, the cement should have been Boone, should have been Smith, should have been Morreale. But they didn't cement his testimony. They sunk it. They caused the wall to crumble. The cement, the mortar was either too watery to set or too dry to even try to set. If this was a real wall of brick, one push would knock it down, one kick would knock it down.

The wall they have to build for you is a wall that you have to live with for a lifetime in this case, rely unhesitatingly on in this case. If you want bind that wall to keep an enemy away, you want to be sure it was a strong and lasting wall, not a wall built on the testimony of Anthony Baynes. A wall that when tested in any way begins to crumble,

the foundation is Baynes, and if you build it on a bad foundation, it must fall.

There are a couple of other counts in the indictment dealing with my client, and they are just as important.

Mr. Dratel mentioned the concept of multiple conspiracies in the sale of narcotics.

I am not going to repeat the concept of multiple conspiracy, but the point is with respect to the quote-unquote conspiracy to sell narcotics, all you heard was that everybody in Newburgh sells drugs on the corner. There are no conspiracies. They buy and they sell.

(Continued on next page)

MR. GREENFIELD: (Continuing) Anthony Strazza in his opening statement told you, look, our client was arrested for a gun, was convicted of possession of a gun. But he sold drugs. But he didn't tell you he was involved in a conspiracy because these were street sales. Maybe on occasion the same person sold to two different people that knew each other. That's not a conspiracy.

The fact that you're carrying a gun to protect yourselves in Newburgh is a smart thing, most probably, but it's not a conspiracy to use a weapon during the course of the sale of narcotics.

The bottomline is that on one occasion he was arrested with a gun, the two-shot Derringer at a party. He wasn't selling drugs. He wasn't carrying drugs. He was arrested that day. The other time he was arrested, you didn't hear a word from the people who took the stand. They used five witnesses, five witnesses to prove to you that on October 7, 2010 Raymond Christian carried a gun. Well, he pled guilty. All they had to do was put the plea in. But you heard that he had the gun, he had the gun, he had the gun. What you didn't hear is he had narcotics on him. You didn't hear that at all.

Was he carrying a gun or was he carrying it to protect his narcotics? It's an important difference. And there is no proof in the record that on either occasion when he had those guns that he did it to protect his narcotics. He sold $20. He

sold $40. You don't need a gun to protect yourself on that. He told you that happened in the opening, but it does not make him a conspirator.

My remarks are basically to a close. And whenever I sum up in a case and I'm talking to the jury my mind, I'm racing through some thoughts. What have I missed? What haven't I said? What could be helpful that I didn't say to help Raymond Christian in this case?

And I can guarantee it for you, when I sit down, within five minutes, damn, I forgot to say this or that. Well there's a prelude to say to you: I may have forgotten something. But if you think that there's something I should have said that you should require the government to address and answer, require them to do it. I've made the suggestions that I think are important.

You don't know Raymond Christian from a hole in the wall. You never saw him before this case started on August 5. But because you don't know him and you never saw him and he comes from that far-away place called Newburgh, is he entitled to anything less than what you'd want if you were sitting in that audience and somebody you cared about, somebody you loved, was sitting at that table? Would you not give him the presumption of innocence that he's entitled to? Would you not give him the fact that the burden never leaves this table, it's never put on the back of the defendant? Would you not give him

the fact that the government must prove its case beyond a reasonable doubt? Would you hold it against him because I chose not put him on the witness stand?

I'm sure the answer is no. But, we listened to you when you took your oaths as jurors the day you got here. And we listened to your answers. And we relied on your answers. And we chose you as jurors based on your answers. So just because he's a stranger, someone you'll never see again in your life, live your oath as jurors and if you do you'll find Raymond Christian not guilty of every count in the indictment.

Thank you.

THE COURT: Thank you, Mr. Greenfield.

Ladies and gentlemen, it's now noon. We're going to go ahead and take our lunch break now. So please be in the jury room no later than 1:15. Until then please do not discuss the case.

(Jury excused)

(Continued on next page)

(In open court)

THE COURT: Anything for me?

MR. NAWADAY: Not from the government, your Honor.

(Luncheon recess)

AFTERNOON SESSION

1:15 p.m.

(Trial resumed; jury not present)

THE COURT: We're bringing out the jury.

(Jury present)

THE COURT: Everyone please be seated.

Ladies and gentlemen, at this time the government will present its rebuttal summation.

Mr. Nawaday.

MR. NAWADAY: Mr. Greenfield said that he was going to recite the record accurately to you. He said he was going to do his best to tell you exactly what you heard at this trial, what was written down by the court reporters. He failed. He didn't do that.

What am I talking about? Well let's talk about the DNA. Mr. Greenfield came up here and he said: Oh, Laquavious Boykin, his DNA should have been tested. He could have been a minor contributor. And that's what the expert said. And what did Mr. Greenfield do? He pointed you to three sentences of Mr. Myers' testimony.

You heard Mr. Myers testify. He testified for a while. What did Mr. Myers say? Something that Mr. Greenfield conveniently didn't put before you in his summation. Of course, defense counsel have no burden, but we can address their arguments.

Page 1089 of the transcript. Ms. McInerney, please pull that up.

Mr. Greenfield confronts Mr. Myers and says: Oh, they never asked you to test Laquavious Boykin's DNA.

What did Mr. Myers say? He said it doesn't matter. It wouldn't matter. That's line 10 of page 1089.

Why wouldn't it have mattered? Because later on, on page 1103, what does Mr. Myers say?

He says, quote, anybody that wouldn't be the main contributor here is inconclusive. Saying ruling somebody out or saying not excluded is an exclusionary statement. It's the same thing as saying they're included. It's the same thing as saying consistent with. And that's not true.

Anybody here that isn't a major contributor is inconclusive. Not ruled out. Not included. Not excluded. None of that. It's inconclusive in regard to anything, but what? But the major contributor, who defense counsel has conceded is Raymond Christian.

What's that an example of? That's an example of admit what you can't deny and deny what you can't admit.

And then what does Mr. Greenfield do? He points you to a protocol that says, oh, well minor contributor should have been put there. But you already know that Mr. Myers says he can't do that. Because it's inconclusive. And Mr. Greenfield didn't point you to another part of the protocol. And we'll

pull up that Defense Exhibit, the protocol from -- started with DNA section D6.4, and page 5. Page 5 of 13. If we can. Page 5.

What does it say numeral 3 on the bottom? It says making no conclusion. In some instances, it may not be possible to discern whether an individual is included or excluded from a profile.

That's exactly what Mr. Myers did. He couldn't tell who a minor contributor was. So, basically, what Mr. Greenfield is hanging his hat on is on the point that Laquavious Boykin can't be excluded as a minor contributor. You know who else can't be excluded? Anyone in this room. There's not enough DNA out there. This whole exercise of circling numbers that match? Again, you heard from Mr. Myers. Doesn't mean a thing.

Yet, why did Mr. Greenfield do that? Well, it's a distraction. That's a word they used and it's a word I'm going to use. It is to distract you. Distract you and only point you to certain pieces of evidence that helps them. That's called agree with what helps you, disagree with what doesn't help you.

What's the point? The point is, something I'd like you to keep in mind, something that defense counsel said, which it's true. Defense counsel aren't witnesses. They're lawyers. The prosecution, we're lawyers. We're not witnesses. What

they say is not evidence.

Evidence? What is evidence? It's the testimony of the witnesses you heard. Anthony Baynes, Jamar Mallory, Danielle Williams, David Evans, Daniel Myers. All the police officers. That's evidence. And the exhibits you saw. Let's talk a second about some of those exhibits briefly.

Again, this is another example of Mr. Greenfield picking and choosing. Remember, he came out here he said, whoa, Raymond Christian, there's testimony he fired two, three shots. But this is a two-shot gun. So Anthony Baynes must be lying.

There was another gun that Raymond Christian was arrested with, I believe, on October 7, 2010. And Raymond Christian said when he made a statement to police after being arrested on this gun that there was one in the chamber, seven in the magazine -- we have the magazine too -- and there are only four bullets left in this magazine.

So did anyone ever say it was this gun he shot off at the party? No. That's the only one Mr. Greenfield showed you. But you have the evidence of another gun that Raymond Christian admitted to possessing. So, defense counsel aren't witnesses. The lawyers aren't witnesses.

So, that brings me to my next point, which is saying something because you want it to be true doesn't make it true. It doesn't make it evidence.

So why does defense counsel do it? And this is something else I'd like you to do. Ask yourself when a lawyer makes an argument, whether the government makes the argument or the arguments you've already heard, are they pointing you to evidence in the case or asking you to speculate? And if they're asking you to speculate, it's up to you, but I submit you should reject it.

And then ask yourself why did they do that? Again, it's a distraction. I will give another example.

Mr. Goltzer came up here -- this was yesterday -- and he said ladies and gentlemen, you know what's happened here, the prosecution has gone into some back room and fed these witnesses a story. They fed them a story. That's what happened. Whoa. Besides accusing the prosecution of misconduct, is there any evidence that happened here? Decidedly not.

Why does Mr. Goltzer do that? Again, to distract you. Why does Mr. Goltzer talk, take time with you in his summation to talk about: Oh, ladies and gentlemen, you know this happens in every case, the government makes the same arguments. What does the government do or anybody does in some other case have anything to do with anything? We are trying this case. It's the evidence in this case that's important.

So, ask yourself is somebody pointing you to evidence or only parts of evidence, picking and choosing, or not. We

submit to you if you look at all of the evidence you'll come to the conclusion that the defendants are guilty.

There's another thing I want you to keep in mind. And you've heard the word common sense. Everyone is absolutely right about that. Use your common sense when you analyze the testimony that you've heard. And use your common sense to bear on whether someone is telling the truth or not. And I submit to you that you'll ask yourself and you'll know when something makes sense and when something doesn't make sense.

I submit to you when something sounds like the truth, the closer you get to it, the closer it matches with everything else, it makes sense. And lies, the closer you get to it, they fall apart. They don't make sense.

Now, I'm going to turn to the main part of the defense summations. And it's a simple one. It's an obvious one. Every single cooperating witness is lying. They're all liars. Lies, lies, lies. And part of the reason you know that is they're criminals. These are terrible people. Danielle Williams set up her sick sister to get robbed. David Evans, he participated in the murder of Freaky's dad. It was a stabbing murder. These people are terrible people. Anthony Baynes participated in 30 assaults, robberies.

Of course they're criminals. But, it's not about whether you like them. You shouldn't. No one is expecting you to like them. It's about whether they were in a position to

know what they're talking about. And what has this case been about? A drug stash house robbery.

So, who would know about it? Who would know about it? Would an accountant know about it? Would a registered nurse know about it? Would a retired youth counselor know about it? No. Decidedly not. People who know about a stash house robbery are criminals. Of course.

And it's the defendants who made those people witnesses. It's the defendants who made Anthony Baynes a witness when they decide to participate in a robbery with him. It's Bow Wow and Gucci who made Jamar Mallory a witness when they went on the directions of L-1 to pick up guns from Kev Gotti and J-Mark. They made those people witnesses.

So it's not about whether you cash a check for these people. It's not about whether you go to them for medical advice. They're not doctors. Is Anthony Baynes a doctor? Of course not. You wouldn't trust him with that. But he knows about robberies. Jamar Mallory knows about a drug deal. Danielle Williams knows about the Bloods.

There's another interesting point about this premise that you can't trust the government's witnesses because they're criminals. And it's a point Mr. Bauer made in passing. I'm going to make it again. How do you know they're criminals? How do you know they lied before? Who told you? They did. They told you.

It's kind of funny. Defense counsel actually wants you to believe these witnesses. They want you to believe that Anthony Baynes is a serial truth-teller. When he says I committed three assaults. Yes, you did. When Daniel Williams says I set up somebody to rob my sister. Yes, you did. Truth-teller. And when did they call them a liar? The second any witness says: Oh, I saw Reckless dealing some drugs. Liar. Oh, I saw Bow Wow at the porch at L-1's. Liar.

It doesn't work like that. You saw them testify. Were they forthcoming when asked difficult questions about their own conduct as they were about the conduct of others?

Also ask yourselves did they only talk about those three defendants? No. They talked about a lot of people. They talked about a lot of people's crimes. In the same way that they spoke about these defendants.

And there's been a lot of discussion about the incentive to tell the truth, the incentive to lie, and about the cooperating witnesses' cooperation agreements. We submit to you those agreements give incentive, they're a big incentive to tell the truth. You have those agreements. Read them. See what they say.

When you boil it down, it's pretty simple. You heard these defendants -- these cooperating witnesses' understanding about what those agreements mean. They meet with the government. They're honest. They don't lie. They testify.

They get their 5K letter. They also told you the outcome of this case doesn't matter to their sentence.

So if that's the case, why in the world do they risk everything to lie? They don't get any upside. It's all downside. They can't take their plea agreements away. And then they're stuck with very lengthy sentences.

Take David Evans, for example. He's got mandatory life. Is he going to lie to put the chance of getting time served or anything less than mandatory life in jeopardy?

By the way, were they honest with you about what they hoped to get? Yeah, they all hoped to get time served. Will they? They have no idea. But they do know that the judge who sentences them is going to know about every bad thing they've done. They'll know about the good things too.

So, is it honest to say, yeah, I'm hoping for time served? Who wouldn't? That's their hope. And they're honest about that. Doesn't mean they're going to get it. So there is no free pass. Like defense counsel seems to want to suggest.

Also think about what they had to do get an agreement. They had to divulge crimes that the government didn't even know about and plead guilty to them. With no guarantee that they'd get an agreement.

Now, I want to give another example of what I call picking and choosing from the testimony. And, again -- and from the evidence. Again, you have the entire record. So you

should look at it. You should ask for it.

But, I believe Mr. Dratel and Mr. Greenfield, they quoted or cited to Akinto Boone's testimony. And they used that testimony to say Baynes was the guy with the gun, with the chrome gun, he came and helped, it was Baynes. And Baynes was the guy who got stabbed.

Is that what happened? Let's look at page 1782, line 9 of the testimony. What does Akinto Boone say?

I'm going to read it to you. Page 1782, line 9. This is an answer from Akinto Boone, "There was other people in there wrestling with Tarrence at the time."

Does defense counsel point that statement out to you? No. But what does that statement mean? It means Tarrence Smith was fighting with someone else. And who was Akinto Boone fighting with? A guy with a gun.

This is page 1789 of Akinto Boone's testimony. "Q. Do you know if Tarrence did anything to any of the robbers?

"A. I heard he stabbed one of them.

"A. I didn't see nothing doing to his fight. You know what I mean. I wasn't even paying attention to his fight."

So who would know if the robber that he was fighting with for the gun was stabbed other than Akinto Boone? Akinto Boone. He wasn't paying attention to Tarrence Smith's fight. And Tarrence Smith, he stabbed -- we know who he stabbed.

Anthony Baynes. He did not stab the guy who Akinto Boone was fighting. And we know who that guy is. Raymond Christian. That was Reckless.

There is another interesting point about that, about Reckless and Mr. Greenfield's insinuation that somehow Reckless is being set up by Anthony Baynes. Well, first off, why not give Reckless a bigger role than the shooting? Why not say Reckless was one of the shooters? Anthony Baynes didn't say that.

And here is a point about agreeing with something when you like it and disagreeing when you don't. Mr. Greenfield pointed out: Oh, after the robbery Anthony Baynes and Quay Quay go to Raymond Christian's grandma's house. That's where Raymond Christian lives. And they saw him there.

Are you supposed to believe Anthony Baynes about that? According to Mr. Greenfield, you are. Because he wants you to believe that Raymond Christian wasn't even at the robbery location. But he was. So believe Anthony Baynes on that part but not on this other part. And it doesn't work like that.

Now, there was this other theme from all of defense counsel and that theme was the conspiracy theory. That the defendants -- that the defendants were setup by cooperating witnesses, that cooperating witnesses set the defendants up.

Now, first off, look at the cooperating witnesses. They -- defense tries to portray them as these criminal

masterminds. Anthony Baynes was 17 years old, 17 years old when he committed this terrible crime. You saw him testify. Is he someone who could come up with some complex setup of these three defendants? I submit to you the answer is no, they cannot.

And then think about this other one. Think about the time log of how this would have to play out. Baynes is in prison since April 2011. Mallory is in prison, that's J-Mark, since September 2012. Over one year later. Danielle Williams, David Evans they're in prison since September 2011. And McDermott goes to prison January 2011.

So, how would this conspiracy have to come about? And what I submit to you is that if you play it out, the events are ridiculous. Because this would assume that Anthony Baynes, while in prison, starting April 2011, somehow gets in touch with Jamar Mallory and -- J-Mark. And he says J-Mark, listen, listen, J-Mark, you're going to get arrested maybe six months later or whatever it is. When the cops come to you, you should cooperate. And when you cooperate, you should tell them that Bow Wow and Gucci came to you and Kev Gotti to get guns. Okay. I'm not sure if that happened because I didn't see that happened, but just say that. Because that's going to help me out. And once you tell them that, you're going to have to also tell them about all your other crimes. And you'll have to admit to them, you'll have to plead to them, and actually there

is no guarantee you're going to get a cooperation agreement. But then you'll plead to everything, you'll have a mandatory minimum of 17 years with a maximum of life, and then perhaps may be called for a trial with just those guys, and maybe get a 5K letter, and maybe get time served. Is that what happened? Of course not. Of course not. It's a ridiculous insinuation.

And also if they were colluding or conspiring wouldn't their lies be better? Wouldn't the story be better? Why does Anthony Baynes not say he was inside that hallway on the porch? But he says he's on the porch. Right.

Why doesn't Ramone McDermott say Bow Wow told him everything when he came with blood on his clothes? Because it's not what happened.

And there's another point related to that. Why these guys? Why these defendants? Didn't Anthony Baynes, David Evans, Danielle Williams, J-Mark, Ramone McDermott, didn't they tell you about so many people? Why not set up Freaky or say Geo was one of the people there, or Snelly, or Quick? Aren't those easy targets too?

And then how is it that all these people say things that match with other evidence in the case? How can that be? Four or five people can't get the same lie right. Anthony Baynes is really lucky if he came up with this plan and it all just matched together.

Now, there is a lot of time spent on how Anthony

Baynes, J-Mark, they've said lies before and they told different stories before. And that's true. They have. Ask yourself again: How do you know that? You know that because they told you. They admitted to it.

Anthony Baynes said that on the night of the robbery, a lot of stories, he just can't remember what the lies were. Spent eight hours talking to police, coming up with a tale to protect himself, absolutely, and to protect his friends: Reckless, Gucci, Bow Wow. And then there's an insinuation well he didn't protect Bash and Baby E. What did he tell you? He told you he got into a fight with Bash. That's why he was stuck on the porch.

So you know they lied because they told you and defense counsel wants you to believe them when they tell you that they've lied. But they don't want you to believe them when there's that one moment they say, those witnesses say: Oh, I was with Reckless. Oh, now, you're a liar. And, again, that's called agreeing with what helps you and disagreeing with what hurts you.

Now, there was this other moment or argument raised by Mr. Thomas' defense counsel to try to show Anthony Baynes must be lying about having seen Gucci out on the streets during certain years. And this is going to be another example of distracting you and picking and choosing things out of the record.

Defense counsel told you you can't believe Anthony Baynes because Gucci was in jail from 2008 to 2010, 2011. Well, they missed some months. They missed some months. They missed about three months in 2008 and about four months in 2010.

It's kind of like what happened to -- I don't know if you remember this, Mr. Strazza was questioning Jamar Mallory about when he decided to cooperate about the Jeffrey Henry murder. And he made the point, Jamar Mallory, you were arrested 2010, that first time, in July 2010 and you didn't come in and cooperate about the murder. Jamar Mallory said basically I'm not a time-traveler because the murder didn't happen yet. That's why I didn't come in and cooperate right away. Again, focus on what defense counsel is trying to do. Trying to distract you from the evidence. The things in this case that show the defendants' guilt.

Now, Mr. Whitaker's lawyer pointed out and argued that, well, Bow Wow could not have gotten blood on his clothes from Jeffrey Henry and that the government told you that in the opening. I submit to you we didn't. We didn't say that at all actually.

And what we have argued and what we've shown you is evidence showing that Bow Wow got that blood on him when he was in that small room, that small foyer, rubbing up against Anthony Baynes who was bleeding, bleeding someone said like it

was dripping all over the place.

MR. GOLTZER: Objection. Misstating the testimony, Judge.

THE COURT: Overruled. The jury will recall what the testimony was.

MR. NAWADAY: Again, that's an example of misdirection. Taking your focus away from all the evidence in the case that points to the defendants.

There was also a lot said about how the Kevin Burden tape, that's the tape of Kev Gotti, the tape with Jamar Mallory. We submit to you that is unvarnished evidence of what happened. That is Kev Gotti saying what he remembered happened when Bow Wow and Gucci came. And defense counsel talks about: Oh, we didn't get a chance to cross-examine him. That video is in evidence.

And the judge is going to instruct you that witnesses -- you've heard witnesses, and you're not supposed to speculate why some people were called or not called, and that those people are equally available or unavailable to other parties. So you can consider and should consider that video. And that video is devastating. Absolutely devastating. And defense counsel talked about there is no corroboration. Look at that video.

For example, Mr. Thomas' lawyers say well there is no evidence that Gucci was a Blood. Yes, there was. One,

multiple witnesses told you that he was. That he used to be Crip and then he turned Blood. And then there's Kevin Burden's unvarnished statement remembering that night when Gucci and Bow Wow came for the guns to use in the robbery.

Ms. McInerney if you can play that. Thank you.

It's right here. This is from the transcript which is only used as an aid but you can have that tape played. What does he say. Gucci was basically what, exactly what L-1 wanted him to be. Because he knew Gucci can't hold water so he was like okay you want to be Blood let's go do some other shit. What shit are they talking about? Robbing.

And, yes, Jamar Mallory was there. And you have that video. Was Jamar Mallory feeding Gotti what to say? No. Those were two people having a conversation. Kevin Burden was saying what he remembered happened that night.

Just speak briefly about Jamar Mallory. I think it was Mr. Dratel, Gucci's lawyer, who said: Oh, Jamar Mallory, he's biased. He's biased against Gucci. That's why he's trying to set him up. He was robbed by Gucci twice. So I guess at that moment we're supposed to believe Jamar Mallory? Because the only way you get to bias is if you believe Jamar Mallory on that. Again, picking and choosing things. That's what the defense counsel is doing. What we submit to you you should do is look at all the evidence in the case and see how it matches and is consistent with each other and says the same

story.

And look at the types of details that match. I'm going to just use one. Anthony Baynes says he's on the porch. He hears L-1 calling people for chains. We've heard that word quite often in this trial. We've also heard that there are a lot of words for gun in Newburgh. There's scat, there's hammer, there's joint, and there's chain. And how is it that Jamar Mallory remembers that call from L-1 that same night and L-1 says I'm sending them young boys for the chains. He doesn't say scat. He doesn't say joint. He doesn't say hammer. I guess Anthony Baynes is really lucky that somehow the details of this conspiracy he's come up with make sense and match other testimony and evidence in the case. And you know that's not true. You know that it's not a conspiracy. It's because that's what happened.

Now, Mr. Thomas' lawyer spent a lot of time during the trial and in their summation talking about who had the chrome .38, who had the black gun, which bullets killed Jeffrey Henry.

First off, it doesn't matter who had what gun. We expect that Judge Ramos will instruct you that you can find the defendants guilty of the murder charge if you determine that they set out to commit the robbery and the death of Jeffrey Henry occurred during that robbery. So what does it matter who had which gun? It doesn't. It doesn't matter at all.

Reckless lost his gun. But if you find that he set

out to commit that robbery and during that robbery Jeffrey Henry was killed, he's guilty of murder.

Also, Mr. Thomas' lawyer and lawyers tried to focus on well there is no forensic evidence of a .38 caliber bullet. Again, why does that matter? It doesn't. One, you've heard testimony from Mr. Fredericks, the detective from Newburgh PD, that a .38 caliber revolver doesn't leave shell casings. So there wouldn't have been shell casings in any event.

And there was another line of questioning and argument about that shootout. And the theme was pretty simple. Akinto Boone is the one who killed Jeffrey Henry. Well, one, you know the facts done bear that out. There are no bullets through that door. Akinto Boone is all the way in the back of the room. Two, doesn't matter under the law even if that did happen, but you know it didn't happen, it didn't happen at all.

But why make that argument? Ask yourselves: What are they trying to do? Are they pointing to evidence in the case? Are they picking and choosing or not?

And then Mr. Dratel kept saying and many of the defense attorneys kept saying there's no corroboration. There's nothing.

You've seen the evidence. I'm not going to go through it again. There is corroboration. And plus you have the tape from Kevin Burden. I'm just going to play a quick part of it.

This is excerpt four.

(Audiovisual recording played)

What is Kevin Burden there saying? All I knew was Bow Wow and Gucci. That's all I knew. Was he drunk? Look at the timestamp. It's not that far in. Was Jamar Mallory -- was J-Mark feeding him what to say? Actually, earlier Kevin Burden is telling J-Mark no, no, you're remembering wrong about certain things.

So the insinuation that Kevin Burden is completely drunk and just making up some tale fed to him by Jamar Mallory is ridiculous. You heard Kevin Burden's words: All I knew was Bow Wow and Gucci. So, is there corroboration? Of course there is.

Is there corroboration that Reckless was there? Yes. He was there too. You've heard the testimony. You've heard he's a major contributor to the blood inside of that mask.

This brings me to my last point. I started with the concept, which is true, that defense counsel aren't witnesses. It's something else that they're not. They're not magicians. They can't make things disappear.

They can't make the testimony of Anthony Baynes disappear when he identifies the people he committed this crime with.

They can't make Jamar Mallory disappear when he tells you that it was Bow Wow and Gotti who came and got those chains.

They can't make the fact that the stories match up go away.

They can't make Danielle Williams go away when she says: Yes, I have seen Bow Wow selling. I have seen L-1 supplying or L-1 -- Bow Wow talking about re-upping from L-1.

They can't make it go away that she's seen Reckless with guns.

They can't make the officers who arrested Reckless with guns go away.

They can't make David Evans go away.

They can't make bloodstains on that foyer wall go away of Anthony Baynes and the fact that that foyer is so small and seven people were crammed in there.

They can't make Ramone McDermott go away when he says: Yes, Bow Wow came to 260 First Street and he's clothes were bloody just around here.

And they can't make the DNA on the ski mask go away.

They can't make the pole camera video go away that shows the robbers going to 54 Chambers and running back from 54 Chambers.

And they can't make Kevin Burden and this tape go away.

They can't make Barbara Morreale go away.

They can't make Akinto Boone go away.

And they can't bring Jeffrey Henry back. Remember

that. Jeffrey Henry is dead because of a botched robbery committed by the defendants.

Defense counsel can't make the evidence that proves their guilt go away as simply and as easily as a puff of smoke from a gunshot that killed Jeffrey Henry that night.

THE COURT: Thank you, Mr. Nawaday.

Ladies and gentlemen, we're going to take a ten-minute break while we set up for the final jury instructions. Ten minutes. Don't discuss the case.

(Jury excused)

(Continued on next page)

(In open court)

THE COURT: Mr. Buchwald.

MR. BUCHWALD: Yes. Your Honor, during Mr. Nawaday's rebuttal he specifically alluded to Kevin Burden and the defense having mentioned that he can't be cross-examined and he then went into an argument about Kevin Burden being equally available to both sides. That was, on this record, wholly improper. Kevin Burden was certainly not equally available to both sides. He is available to them if they immunize him, as they did with other witnesses in this case. This is not something that we can do, as your Honor has ruled. And to have made that argument on this record is improper. We believe that either your Honor should alter the instruction about equally available witnesses or declare a mistrial.

MR. GOLTZER: I join in those remarks and would ask the court to instruct the jury that Mr. Burden was more available to the prosecution than the defense because we have no authority to even ask your Honor to direct them to provide him.

MR. STRAZZA: We join in that application as well.

THE COURT: Mr. Nawaday.

MR. NAWADAY: Your Honor, the instruction is valid. It should be given. Mr. Burden was equally unavailable to us because we cannot control whether DOJ will allow us to immunize somebody. We cannot be made to immunize somebody, especially

somebody like Mr. Burden. So he is somebody who we knew, who asserted the Fifth Amendment, and who ultimately it's not our decision of whether he's going to get immunity or not.

MR. DRATEL: Your Honor, the Department of Justice is not separate from the United States Attorney's Office. That is a fallacious argument.

MR. GOLTZER: Or are we aware that there was an application made to Washington to get approval for a 6002 order.

By the way, they reversed the burden by commenting on our failure to present a defense in violation of the Sixth Amendment there.

THE COURT: I don't know what you're talking about there.

MR. GOLTZER: By suggesting that we could have called him, they're putting the burden on us. That's not true.

THE COURT: First of all, I agree that the Department of Justice is one entity. But that aside, I believe -- and I could be wrong, the record will bear this out -- that Mr. Nawaday said that Mr. Burden was equally available and equally unavailable to all sides.

MR. GOLTZER: He said equally available.

MR. BAUER: I said equally available and equally unavailable.

THE COURT: In any event, I don't believe that that

comment is untrue as matter of law, nor am I going to instruct the jury that he is more available to the government than not. So, the application for a mistrial is denied.

Anything further?

Aside from all of the objections, all counsel did a very good job on their summations.

MR. BUCHWALD: Thank you, your Honor. Do we still have ten minutes?

THE COURT: No. You have less than ten minutes.

(Recess)

Okay. We're bringing the jury back.

(Continued on next page)

(In open court)

THE COURT: Ladies and gentlemen, you'll note before you sit down that there are binders on your seat so please pick those up and everyone please be seated and if you open your binders there are three documents in there. One is in the pocket. It's the verdict form that your foreperson will fill out when you reach a verdict. And in the rings themselves the first document is a copy of the indictment, which is about four pages. And if you go four pages in is the copy of the jury charge.

Now, this is a document. It's about 60 pages. It is what I will read to you now. And if history is any guide it will take me about an hour-and-a-half or so to get through the charge. You have a copy of exactly what I'm going to read. You can either read along with me, if that helps you, or you can simply have it with you and listen to me as I read. You should know that you will have this booklet with you as you deliberate. So I will leave it up to you as to whether you want to read along or just listen or whatnot.

The other thing is, again, it's going to take approximately an hour-and-a-half. I don't intend to break before I get to the end. If at any point you feel as though you need to stand up and stretch, feel free to do so. I will not take offense. And we'll get through it.

So, again it is the tradition in all courts because

the charge is such an important part of a criminal trial that the charge, the words are very important and the charge is read. This is not a time for judges to be ad-libbing what the law is. So with that, let's begin.

Members of the Jury, we have almost reached the point where you are about to begin your final function as jurors, which, as you all appreciate, is the most important -- one of the most important duties of citizenship in this country.

My instructions to you will be in four parts. First, I will give some introductory instructions about the role of the court and of the jury and about the presumption of innocence and the government's burden of proof. Second, I will describe the charges and the law governing those charges, which you will apply to the facts as you find them to be established by the proof. Third, I will give you instructions concerning the evaluation of the evidence. And the fourth, the final section of these instructions will relate to your deliberations.

I will first describe the role of the court and the jury.

It is my duty to instruct you as to the law, and it is your duty to accept these instructions of law and apply them to the facts as you determine them. If an attorney stated a legal principle different from any that I state to you in my instructions, it is my instructions you must follow. You

should not single out any instruction as alone stating the law, but you should consider my instructions as a whole when you retire to deliberate. You should not be concerned about the wisdom of any rule that I state. Regardless of any opinion you may have about what the law may be or ought to be, it would be a violation of your oath to base your verdict on any view of the law other than that which I give you.

You, the members of the jury, are the sole and exclusive judges of the facts. You pass on the evidence, determine the credibility of witnesses, resolve such conflicts as there may be in the testimony, draw whatever reasonable inferences you decide to draw from the facts as you determine them, and determine the weight of the evidence. In doing so, remember that you took an oath to render judgment impartially and fairly, without prejudice or sympathy or fear, based solely on the evidence and the applicable law.

The fact that the prosecution is brought in the name of the United States of America entitles the government to no greater consideration than that given to any other party to this litigation. By the same token, the government is entitled to no less consideration.

There are three defendants in this case: Raymond Christian, Tyrell Whitaker, and Glenn Thomas. The defendants have pleaded not guilty to the charges against them. As a result of their pleas of not guilty, the burden is on the

government to prove guilt beyond a reasonable doubt. This burden never shifts to the defendants for the simple reason that the law never imposes upon a defendant in a criminal case the burden or duty of testifying, or calling any witness, or locating or producing any evidence.

The law presumes each defendant to be innocent of each charge against him. This presumption of innocence alone is sufficient to acquit each defendant. This presumption was with each defendant when the trial began and remains with each defendant unless and until you are convinced that the government has proven the defendant's guilt beyond a reasonable doubt.

The question that naturally arises is: What is a reasonable doubt? What does that term mean? The words almost define themselves. It is a doubt based on reason and arising out of the evidence in the case or the lack of evidence. It is a doubt that a reasonable person has after carefully weighing all of the evidence in the case.

Reasonable doubt is a doubt that appeals to your reason, your judgment, your experience, and your common sense. If, after a fair and impartial consideration of all of the evidence you can candidly and honestly say that you are not satisfied with the guilt of a defendant, that you do not have an abiding and firm belief of the defendant's guilt -- in other words, if you have such a doubt as would reasonably cause a

prudent person to hesitate in acting in matters of importance in his or her own affairs -- then you have a reasonable doubt, and in that circumstance it is your duty to acquit the defendant.

On the other hand, if after a fair and impartial consideration of all of the evidence you can candidly and honestly say that you do have an abiding belief of the defendant's guilt -- such a belief as a prudent person would be willing to act upon in important matters in the personal affairs of his or her own life -- then you have no reasonable doubt and under such circumstances it is your duty to convict the defendant.

One final word on this subject: Reasonable doubt is not whim or speculation. It is not an excuse to avoid the performance of an unpleasant duty. Nor is it sympathy for the defendant. Beyond a reasonable doubt does not mean a positive certainty or beyond all possible doubt. After all, it is virtually impossible for a person to be absolutely and completely convinced of any contested fact that by its nature is not subject to mathematical proof and certainty. As a result, the law in a criminal case is that it is sufficient that the guilt of a defendant is established beyond a reasonable doubt not beyond all possible doubt.

(Continued on next page)

Summary of the charges.

The defendants in this case are Raymond Christian, also known as Reckless; Tyrell Whitaker, also known as Bow Wow; and Glenn Thomas, also known as Gucci.

Let us now turn to the charges against the defendants in the indictment. I remind you that the indictment itself is not evidence. It merely describes the charges made against the defendants. It is an accusation. It may not be considered by you as any evidence of the guilt of the defendants.

Before you begin your deliberations, you will be provided with a copy of the indictment. I will not read the indictment to you at this time. Rather, I will summarize the offenses charged in the indictment and then explain in detail the elements of each offense.

You are being asked to deliberate on six counts. I instruct you that you should not speculate as to why that is. Each count must be considered separately as to each defendant.

Count One charges that in or about December 2010, Raymond Christian, and Glenn Thomas, together with others, conspired to commit a robbery in Newburgh, New York, of persons they believed to be in possession of narcotics and proceeds of narcotics sales.

Count Two charges that on or about December 15, 2010, Raymond Christian, Tyrell Whitaker, and Glenn Thomas, together

with others, committed and attempted to commit a robbery of individuals they believed to be in possession of narcotics and proceeds of narcotics sales in the vicinity of 54 Chambers Street, Newburgh, New York.

Count Three charges that from in or about 2008 through in or about September 2012, Raymond Christian and Glenn Thomas, together with others, intentionally knowingly conspired to distribute and to possess with intent to distribute cocaine base in a form commonly known as crack, heroin, and marijuana.

Count Four charges that on or about December 15, 2010, Raymond Christian, Tyrell Whitaker, and Glenn Thomas, and others, used and possessed firearms, and aided and abetted the use and possession of firearms and in the course thereof caused the death of Jeffrey Henry.

Count Five charges that on or about December 15, 2010, Raymond Christian, Tyrell Whitaker, Glenn Thomas, and others, used, carried, possessed and discharged firearms and aided and abetted the use, carrying, possession and discharge of firearms during and in relation to the robbery conspiracy and robbery charged in in Counts One and two.

Count Six charges that in on about 2008 through September 2012, Raymond Christian and Glenn Thomas, and others, used, carried, and possessed firearms and aided and abetted the use, carrying, and possession of firearms during and in relation to the drug conspiracy charged in Count Three.

As you know, the indictment contains six charges. You will need to consider each charge against each charged defendant and determine whether the government has carried its burden of proof with respect to that charge and the defendant you are considering. Your verdict on any single count should not control your decision on any other count. I will provide you with a verdict form, and you will need to report the results of your deliberations on each count and defendant on the verdict form. To do so, you will need to keep track during your deliberations of which defendant you are considering, which charges you are considering, and even more specifically the legal elements applicable to the charge. I make these observations to ensure that you understand the structure of the charges against the defendants and your obligation to consider the charges against each defendant separately and under each statute and theory of liability alleged in the indictment.

In addition, some of the evidence in this case was limited to one defendant. Let me emphasize that any evidence admitted solely against one defendant may be considered only as against that defendant and may not enter into your deliberations on any other defendant.

In a few moments, I will instruct you on the elements of each of the charged offenses. I will provide you with all the instructions you need to decide whether the government has

proven beyond a reasonable doubt each of the necessary elements on each of the charges in the indictment. During your deliberations you will have a copy of the indictment to reference as you deem necessary. You will have also a copy of my instructions.

The indictment alleges that certain acts occurred on or about various dates. It is not necessary, however, for the government to prove that the alleged crimes were committed on exactly those dates. The law requires only that the government prove beyond a reasonable doubt a substantial similarity between the dates and months alleged in the indictment and the dates and months established by the evidence. Further, it is not required that any defendant committed a charged crime throughout the entire time period charged in a particular count; it is sufficient for the government to prove beyond a reasonable doubt that at some time during the period charged in the indictment, the defendant participated in the charged crime.

Count One, robbery conspiracy.

First, note that the Count One only charges defendants Christian and Thomas. Specifically, Count One of the indictment charges that Raymond Christian and Glenn Thomas violated Section 1951 of Title 18 of the United States Code.

That section provides as follows:

Whoever in any way or degree obstructs, delays, or affects commerce of the movement of any article or commodity in commerce, by robbery or extortion, or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be guilty of a crime.

Specifically, Count One charges that:

In or about December 2010, in the Southern District of New York, and elsewhere, Raymond Christian, also known as Reckless, and Glenn Thomas, also known as Gucci, the defendants, and others known and unknown, unlawfully and knowingly did combine, conspire, confederate, and agree together and with each other to commit robbery, as that term is defined in Title 18, United States Code, Section 1951(b)(1), and would and did thereby obstruct, delay, and affect commerce and the movement of articles and commodities in commerce, as that term is defined in Title 18, United States Code, Section 1951(b)(3), to wit, the defendants and others agreed to commit an armed robbery of individuals they believed to be in possession of narcotics and narcotics proceeds in Newburgh, New York.

I will now instruct you on the law of conspiracy. A conspiracy is a kind of criminal partnership -- an agreement of two or more persons to join together to accomplish some unlawful purpose. The crime of conspiracy to commit robbery is

an independent offense, separate and distinct from an actual robbery offense. Indeed, you may find the defendants charged in Count One guilty of the crime of conspiracy to commit robbery even if you find that there was no actual robbery. Congress has deemed it appropriate to make conspiracy, standing alone, a separate crime, even if the conspiracy is not successful.

In order to prove the defendants guilty of the robbery conspiracy charged in Count One of the indictment, the government must establish the following two elements beyond a reasonable doubt:

First, the prosecution must prove the existence of the robbery conspiracy charged in Count One; and,

Second, the prosecution must prove that the defendants knowingly and willfully became members of the conspiracy.

I will now separately instruct you on each of these elements.

First element -- the existence of a conspiracy.

The first element that the prosecution must prove beyond a reasonable doubt to establish the offense of conspiracy is that two or more persons entered the unlawful agreement charged in the indictment. A conspiracy is a combination, agreement, or understanding of two or more persons to accomplish, by concerted action, a criminal or unlawful purpose. The unlawful purpose alleged to have been the object

of the conspiracy charged in Count One is the commission of a robbery.

The gist, or the essence, of the crime of conspiracy is an unlawful agreement between two or more people to violate the law. The first element of the crime of conspiracy thus has two parts, one, an agreement and, two, an illegal object of the conspiracy. I am now going to describe both parts of this element to you.

An agreement.

To meet met its burden of proof on this element, the government must prove that there was an agreement. However, the prosecution is not required to show that two or more people sat down around a table and entered into a solemn pact, orally or in writing, stating that they had formed a conspiracy to violate the law and spelling out all of the details of the plans and the means by which the unlawful project was to be carried out or the part that each of the persons who is a party to the conspiracy is going to play. Indeed, it would be quite extraordinary if there were ever such a formal document or specific oral agreement in a conspiracy.

Common sense will tell you that when people in fact undertake to enter into a criminal conspiracy, much is left to the unexpressed understanding. Conspirators do not usually reduce their agreements to writing. They don't typically publicly broadcast their plans. By its very nature, a

conspiracy is almost always secret in its origin and execution. It is enough if two or more people in some way or manner, impliedly or tacitly, come to an understanding to violate the law. Express language or specific words are not required to indicate assent or agreement to form the conspiracy. You need only find that two or more people entered into the unlawful agreement alleged in the indictment in order to find that a conspiracy existed.

In determining whether there has been an unlawful agreement as alleged in Count One, you may judge the proven acts and conduct of the alleged coconspirators that were taken to carry out the apparent criminal purpose. The old adage, "actions speak louder than words", is applicable here. Disconnected acts, when taken together in connection with one another, can show a conspiracy or an agreement to secure a particular result just as satisfactorily and conclusively as more direct proof.

When people enter into a conspiracy to accomplish an unlawful end, they become agents or partners of one another in carrying out the conspiracy. In determining the factual issues before you, you may take into account any acts done or statements made by any of the alleged coconspirators during the course of the conspiracy, even though such acts or statements were not made in the presence of the defendant or were made without his knowledge.

Of course, proof concerning the accomplishment of the object of a conspiracy may be the most persuasive evidence that the conspiracy itself existed, but it is not necessary, as I have said, that the conspiracy actually succeeded for you to conclude that it existed. In deciding whether the conspiracy charged in Count One existed, you may consider all the evidence of the acts, conduct, and statements of the alleged conspirators and the reasonable inferences to be drawn from that evidence. It is sufficient to establish the existence of the conspiracy if, after considering all of the relevant evidence, you find beyond a reasonable doubt that the minds of at least two alleged conspirators met in an understanding way, and that they agreed, as I have explained, to work together to accomplish the object or objective of the conspiracy charged in Count One.

In short, the prosecution must prove beyond a reasonable doubt that at least two alleged conspirators came to a mutual understanding, either spoken or unspoken, to commit the robbery in the manner charged in Count One.

Object of the conspiracy.

The second part of the first element relates to the object, or goal, of the conspiracy.

According to the indictment, the goal of the conspiracy alleged in Count One was to commit an armed robbery of individuals believed to be in possession of narcotics and

narcotics proceeds in Newburgh, New York. Specifically, the defendants are charged with agreeing with others to commit the robbery of individuals selling crack cocaine and marijuana from a house located at 54 Chambers Street in Newburgh, New York.

A robbery is the unlawful taking of personal property from another against his or her will. This is done by threatening or actually using force violence or fear of injury immediately or in the future to a person or property.

In order to find that a defendant conspired to commit robbery, you must find that the government proved beyond a reasonable doubt that the defendant unlawfully agreed with at least one other person to, one, obtain or take the personal property of another, or from the presence of another, or attempted to do so; two, did so against the intended victim's will by actual or threatened force violence or fear of injury, whether immediate or in the future; and, three, that the defendant's actions would have in any way or degree obstructed, delayed or affected interstate commerce. I will discuss these concepts in greater detail in a few minutes.

One must conspire to take property, and I instruct you that the "property" as used in these instructions means anything of value, including cash, jewelry and other items of value, such as illegal narcotics.

Second element, knowing participation in the conspiracy. If you conclude that the government has proven

beyond a reasonable doubt that the conspiracy charged in Count One of the indictment existed and that the conspiracy had as its object the illegal purpose charged in the indictment, then you must next determine the second question: Whether the defendant participated in the conspiracy with knowledge of its unlawful purpose and in furtherance of its unlawful objective.

In relation to the conspiracy charged in Count One, the government must prove beyond a reasonable doubt that the defendant unlawfully, knowingly, willfully and intentionally entered into the conspiracy and that the defendant agreed to take part in the conspiracy to promote and cooperate in its unlawful objective.

The terms "unlawfully" and "knowingly" are used because if you find that the defendants did join the conspiracy, you must also consider whether the prosecution has proven beyond a reasonable doubt that in doing so the defendants knew what they were doing. In other words, the government must prove beyond a reasonable doubt that the defendants joined the conspiracy deliberately and voluntarily.

"Unlawfully" simply means contrary to law. A defendant need not have known that he was breaking any particular law, but he must have been aware of the generally unlawful nature of his acts.

An act is done "knowingly," "willfully," and "intentionally" if it is done deliberately and purposely; that

is, a defendant's acts must have been the product of that defendant's conscious objective, rather than the product of a mistake or accident or mere negligence or some other innocent reason.

A defendant's knowledge is a matter of inference from the facts proved. The ultimate facts of knowledge and criminal intent, though subjective, may be established by circumstantial evidence, based upon a person's outward manifestations, his words, his conduct, his acts, and all the surrounding circumstances disclosed by the evidence and the rational or logical inferences that may be drawn there from. The process of drawing inferences from facts in evidence is not a matter of guesswork or speculation. An inference is a deduction or conclusion which you, the jury, are permitted to draw -- but not required to draw -- from the facts which have been established by either direct or circumstantial evidence. In drawing inferences, you should exercise your common sense.

When you come to decide, for example, whether a defendant agreed with others to commit a robbery, you need not limit yourself to just what he said, but you may also look at what he did and what others did in relation to him, and, in general, everything that occurred. Circumstantial evidence, if believed, is of no less value than direct evidence. In either case, the essential elements of the crime charged must be established beyond a reasonable doubt. The government contends

that evidence of acts alleged to have taken place by or with each defendant or in his presence show beyond a reasonable doubt each defendant's knowledge of the unlawful purpose of the conspiracy. By pleading not guilty, each defendant denies that he was a member of this conspiracy. It is for you to determine whether the government has established to your satisfaction and beyond a reasonable doubt that the defendants possessed such knowledge and intent.

It is not necessary for the government to show that a defendant was fully informed as to all the details of the conspiracy in order for you to infer knowledge and intent on the part of the defendant. To have guilty knowledge, a defendant need not have known the full extent of the conspiracy or all of the activities of all the conspiracy's participants.

Similarly, it is not necessary for a defendant to have known every other member of the conspiracy. In fact, a defendant may know only one other member of the conspiracy and may still be considered a coconspirator. Nor is it necessary for a defendant to have received any monetary benefit from his participation in the conspiracy or to have a financial stake in the outcome of the alleged joint venture. It is enough if a defendant participated in the conspiracy unlawfully and knowingly, as I have defined those terms.

The duration and extent of a defendant's participation has no bearing on the issue of that defendant's guilt. A

defendant need not have joined the conspiracy at the outset. A defendant may have joined the conspiracy at any time in its progress, and a defendant will be held responsible for all that was done before he joined and all that was done during the conspiracy's existence while he was a member. Each member of a conspiracy may perform separate and distinct acts. Some conspirators play major roles, while others play minor roles in the scheme. An equal role is not what the law requires. In fact, even a single act may be sufficient to draw a defendant within the scope of the conspiracy.

It is important for you to note that the defendant's participation in the conspiracy must be established by independent evidence of his own acts or statements as well as those of the other alleged coconspirators, and the reasonable inferences which may be drawn from them.

However, I want to caution you that a person's mere association with a member of the conspiracy does not make that person a member of the conspiracy, even when that association is coupled with knowledge that a conspiracy is taking place. In that context, membership in a gang such as the Bloods is not the same as membership in a conspiracy. Nor is attendance at gang meetings or functions. Nor is informal association with others, even if on a regular basis. Mere presence at the scene of a crime, even coupled with knowledge that a crime is taking place, is not sufficient to support a conviction. In other

words, knowledge without agreement and participation is not sufficient. What is necessary is that the defendant joined in the conspiracy with knowledge of its unlawful purposes and with an intent to aid in the accomplishment of its unlawful objectives.

In sum, the prosecution must prove beyond a reasonable doubt that the defendant -- with an understanding of the unlawful character of the conspiracy -- knowingly and intentionally engaged, advised or assisted in the conspiracy for the purpose of committing a robbery. The defendants thereby become knowing and willing participants in the unlawful agreement -- that is to say, each became a coconspirator.

Once a conspiracy is formed, it is presumed to continue until either its objective is accomplished or there is some affirmative act of termination by the members. So, too, once a person is found to be a member of a conspiracy, he or she is presumed to continue as a member in the conspiracy until a conspiracy is terminated or achieves its objective, unless it is shown by some affirmative proof that the person withdrew and disassociated himself or herself from it.

Count One of the indictment contains a section entitled "Overt Acts." You will have a copy of the indictment with you while you deliberate. Although the indictment lists overt acts, the prosecution need not prove that a defendant or any accomplice committed any overt act. As I have told you, to

prove a conspiracy, the prosecution need only prove the unlawful agreement, and the defendants' knowing participation in the conspiracy.

Liability for acts and declarations of coconspirators.

When considering the robbery conspiracy charged in Count One, I instruct you that when people enter into a conspiracy to accomplish an unlawful end, they become agents or partners of one another in carrying out the conspiracy. In determining the factual issues before you, you may consider against defendants any acts or statements made by any of the people that you find, under the standards I have already described, to have been their coconspirators, even though such acts or statements were not made in his presence or were made without their knowledge.

Now to Count Two, robbery.

I will now turn to Count Two, which names all three defendants. Specifically, Count Two alleges that Raymond Christian, Tyrell Whitaker, and Glenn Thomas, committed a robbery and attempted to commit a robbery in Newburgh on or about December 15, 2010.

This count reads as follows:

On or about December 15, 2010, in the Southern District of New York and elsewhere, Raymond Christian, also known as Reckless, Tyrell Whitaker, also known as Bow Wow, and Glenn Thomas, also known as Gucci, the defendants, and others

known and unknown, unlawfully and knowingly did commit and attempt to commit robbery, as that term is defined in Title 18 United States Code, Section 1951(b)(1), and did thereby obstruct, delay and affect commerce and the movement of articles and commodities in commerce, as that term is defined in Title 18, United States Code, Section 1951(b)(3), to wit, the defendants committed and attempted to commit an armed robbery of individuals they believed to be in possession of narcotics and narcotics proceeds in the vicinity of 54 Chambers Street, Newburgh, New York.

The allegation contained in Count Two is brought under the law that prohibits robbery and also under a provision of the Federal Criminal Code that makes it a crime for anyone to aid, abet, counsel, command, induce, or procure the commission of another crime. I will provide instructions on those concepts in a few minutes.

In order to meet its burden of proof on Count Two, the government must prove beyond a reasonable doubt each of the following elements:

First, that the defendants knowingly, obtained or took or attempted to take, the property of another;

Second, that the defendants did so against the victim's will, by actual or threatened force, violence or fear of injury, whether immediately or in the future;

Third, that as a result of the defendant's actions

interstate commerce, or an item moving in interstate commerce, was delayed obstructed, or affected in any way or degree;

Fourth, the government must also establish beyond a reasonable doubt that the defendants acted knowingly, willfully, and unlawfully.

I have already explained the concepts of "knowingly" "willfully" and "unlawfully" in connection with the charge contained in Count One, and you should follow my previous instructions on this point.

The first element the government must prove beyond a reasonable doubt is that the defendant knowingly obtained and attempted to obtain the personal property of another or from the presence of another. The term property includes tangible and intangible things of value. In this case the government alleges that the object of the robbery charged in Count Two was narcotics and narcotics proceeds.

The second element that the government must prove beyond a reasonable doubt is that the defendants took, and attempted to take, the personal property against the victim's will, by actual or threatened force, violence, or fear of injury, whether immediate or in the future. It is not necessary that the government prove that force, violence, and fear were all used or threatened. The government satisfies its burden in this regard if it proves beyond a reasonable doubt that any of these methods were employed.

In considering whether a defendant has used or threatened to use force, violence or fear, you should give those words their common and ordinary meaning and understand them as you normally would. The violence does not have to be directed at the person whose property was taken. The use of a threat of force or violence might be aimed the at a third perpendicular. A threat may be made verbally or by a physical gesture. Whether a statement or physical gesture by a defendant actually was a threat depends upon the surrounding facts.

Fear exists if at least one victim experiences anxiety, concern, or worry over expected personal harm. The existence of fear must be determined by the facts existing at the time of a defendant's actions.

Your decision whether a defendant used or threatened fear of injury involves a decision about the victim's state of mind at the time of the defendant's actions. It is obviously impossible to ascertain or prove directly a person's subjective feeling. You cannot look into a person's mind to see what hills or her state of mind is or was. But a careful consideration of the circumstances and the evidence may enable you to decide whether fear would reasonably have been the victim's state of mind.

Looking at the situation and the action of people involved may help you determine what their state of mind was.

You can consider this kind of evidence -- known as "circumstantial evidence" -- in deciding whether property was obtained by a defendant through the use or threat of fear.

It is not necessary that the fear be a consequence of a direct threat; it is sufficient that the surrounding circumstances render the victim's fear reasonable. You must find that a reasonable personal would have been fearful in the circumstances.

The third element that the government must prove is that the robbery affected interstate or foreign commerce, even if the effect would have been slight or minor.

The requirement of showing an effect on commerce involves only a minimal burden of proving a connection to interstate commerce, and is satisfied by conduct that affects commerce in any way or degree. The requirement may be satisfied by a showing of a very slight effect on interstate commerce. Even a potential or subtle effect on commerce will suffice.

With regard to this element, it is not necessary for the government to prove that a defendant's conduct actually affected commerce. It is sufficient if the alleged robbery possibly or potentially would have affected interstate or foreign commerce.

It is not necessary for you to find that a defendant intended or anticipated that the effect of his own acts, or the

acts of his coconspirators, would be to affect interstate commerce or that the defendant or his coconspirators had or shared a purpose to affect commerce. All that is necessary is that the natural effect of the acts he conspired to commit would either actually or potentially affect interstate or foreign commerce.

Nor do you have to decide whether the effect on interstate commerce was or would have been harmful or beneficial to a particular business or to commerce in general. The government satisfies its burden of proving an effect on commerce if it proves beyond a reasonable doubt any effect, whether harmful or not.

When considering this element, it is important for you to know that commerce affected or potentially affected need not be lawful. Activities affecting or potentially affecting unlawful interstate active, such as trafficking in illegal narcotics that have traveled in interstate commerce, fall within the purview of the statute.

As I have stated, the defendants are charged in Count Two with committing the robbery alleged or "attempting" to commit that robbery on December 15, 2010. So let me say a few words about the meaning of a"attempt." An attempt is similar to the crime of conspiracy if that there is no requirement that the attempt be successful or that a defendant actually carried out the crime he was trying to commit.

In order to prove the charge of attempting to commit the robbery charged in Count Two, the government must establish beyond a reasonable doubt, one, that the defendant you are considering intended to commit the crime charged and, two, that the defendant willfully took some action that was a substantial step in an effort to bring about or accomplish the crime.

Mere intention to commit a specific crime does not amount to an attempt. In order to convict the defendant of an attempt, you must find beyond a reasonable doubt that the defendant intended to commit the crime charged and that he took some action which was a substantial step toward the commission of the crime.

In determining whether the defendant's actions amounted to a substantial step toward the commission of the crime charged, you must distinguish between mere preparation on the one hand and the actual doing of the criminal deed on the other. Mere preparation, which may consist of planning the offense or of devising, obtaining, or arranging a means for its commission, is not an attempt, although some preparations may amount to an attempt. Conduct shall be held to constitute a substantial step if it is strongly corroborative of the actor's criminal purpose. A verbal agreement, without more, is insufficient for the substantial step requirement. Put another way, the acts of a person who intends to commit a crime will constitute an attempt where the acts themselves clearly

indicate an intent to willfully commit the crime and the acts are a substantial step in a course of conduct planned to culminate in the commission of the crime.

In order to sustain its burden of proof on the charge of attempted robbery, the government must prove that the defendant you are considering, one, attempted to obtain, or take, the property of another, two, he did so against the victim's will, by actual or threatened force, violence or fear of injury, whether immediate or in the future, three, that the defendant's actions actually or potentially in any way or degree, obstructed, delayed or affected interstate commerce, and, four, that the defendant acted unlawfully, knowingly and willfully.

Now to Count Three. Count Three of the indictment charges that Raymond Christian and Glenn Thomas participated in a conspiracy to violate the narcotics laws of the United States. This count only charges defendants Christian and Thomas.

Specifically, Count Three charges that:

From in or about 2008 through in or about September 2012, in the Southern District of New York and elsewhere, Raymond Christian, also known as Reckless, and Glenn Thomas, also known as Gucci, the defendants, and others known and unknown intentionally and knowingly did combine, conspire, confederate and agree together and with each other to violate

the narcotics laws of the United States.

It was a part and an object of the conspiracy that from in or about 2008 to in or about September 2012 in the Southern District of New York and elsewhere, Raymond Christian, also known as Reckless, and Glenn Thomas, also known as Gucci, the defendants, and others known and unknown, would and did distribute and possess with intent to distribute controlled substances in violation of Title 21, United States Code, Section 841(a)(1).

The controlled substances involved in the offense were, one, mixtures and substances containing a detectable amount of cocaine base in a form commonly known as crack, in violation of Title 21, United States Code, Section 841(b)(1)(C), two, mixtures and substances containing a detectable amount of heroin, in violation of Title 21, United States Code, Section 841(b)(1)(c), and, three, a quantity of marijuana, in violation of Title 21, United States Code, Section 841(b)(1)(D).

As I told you earlier when we discussed the robbery conspiracy charged in Count One, to sustain its burden of proof with respect to a charge of a conspiracy, the government must prove beyond a reasonable doubt the following two elements:

First, the existence of the conspiracy charged -- that is, that there was, in fact, an agreement or understanding to violate those provisions of the law that make it illegal to

distribute narcotics or to possess narcotics with the intent to distribute them.

Therefore, the first question for you is, Did the conspiracy alleged in Count Three exist? Was there such a conspiracy to distribute illegal narcotics, or to possess narcotics with the intent to distribute them?

Second, the government must prove beyond a reasonable doubt that the defendants knowingly became members of the conspiracy charged; that is, that they knowingly associated themselves with the conspiracy, and participated in the conspiracy to distribute or possess with the intent to distribute narcotics.

The first element, existence of the conspiracy.

As I mentioned earlier a conspiracy is a combination, an agreement, or an understanding of two or more persons to accomplish by concerted action a criminal or unlawful purpose. I explained federal conspiracy law in connection with Count One. You should apply those same instructions in considering Count Three.

Remember, the conspiracy alleged in Count Three is the agreement to distribute or possess with the intent to distribute a controlled substance, and it is an entirely distinct and separate offense from the actual distribution or possession of a controlled substance.

Object of the conspiracy.

The objects of a conspiracy are the illegal goals the coconspirators agree or hope to achieve. Again, the indictment here alleges the existence of three objects, relating, as I stated a moment ago, to the distribution of three distinct controlled substances: Crack cocaine, marijuana, and heroin.

The government need not prove all three of the objects charged beyond a reasonable doubt. In other words, an agreement to accomplish any of the objects of the conspiracy is sufficient.

Nevertheless, if you do find beyond a reasonable doubt that all three of the objects were proven, you must be unanimous as to the object you do find. That is, in order to find either defendant guilty, you must all be in agreement with respect to at least one of the alleged objects of the conspiracy.

If the government fails to prove beyond a reasonable doubt that at least one of the objects charged in the indictment was, in fact, an object of the conspiracy, then you must find the defendants not guilty. If, on the other hand, you find that the government has proved beyond a reasonable doubt reasonable doubt that there was a conspiracy with one or other of the objects charged, then the illegal object element is satisfied.

I will define the terms "distribution" and "possession" for you in a moment. As I will explain, to

"distribute" means simply to transfer to another. It does not require a sale. "Possession with intent to distribute" simply means the possession of a controlled substance with the intention, or purpose, to distribute it to another person or persons.

Let me note that the government need prove only that a defendant conspired to distribute the controlled substance or that he conspired to possess the controlled substance with the intent to distribute it. The government need not prove both.

Let me also note something regarding the quantity of the drugs involved. I instruct you that the actual quantity of the controlled substance involved in the conspiracy charged in Count Three is not an element of this crime, so you need not be concerned with quantity in determining whether a defendant is guilty or not guilty. In order to determine whether a defendant is guilty you need only find beyond a reasonable doubt that a conspiracy exited to distribute or possess with the intent to distribute some amount of a controlled substance.

As I have just described, the prosecution must prove beyond a reasonable doubt that at least two alleged conspirators came to a mutual understanding, either spoken or unspoken, to possess and distribute a controlled substance in the manner charged in Count Three. Now, the second part of the first element relates to the object, or the objective, of the conspiracy. Count Three charges that the objects of the

conspiracy were to the distribution of crack cocaine, heroin, and marijuana, and the possession of crack cocaine, heroin and marijuana with the intent to distribute it.

In that regard, the government has presented evidence that the defendant Thomas admitted to the crime of distributing narcotics in 2007. I instruct you that you cannot consider that evidence in determining whether the government has proved Mr. Thomas's involvement in the conspiracy charged in Count Three.

Now I will instruct you about the objects of the conspiracy charged in Count Three by defining the terms "distribution" and "possession with intent to distribute"

Distribution.

The word "distribution" means the actual, constructive or attempted transfer of the drug. To distribute simply means to deliver, to pass over, to hand over something to another person, or to cause it is it to be delivered, passed on or handed over to another. Distribution does not require a sale.

What does "possession with intent to distribute" mean? I will first discuss the concept of "possession" and then discuss the concept of "intent to distribute."

We begin with the concept of "possession." The legal concept of possession may differ from the everyday usage of the terms. Actual possession is what most of us think of as possession; that is, having physical custody or control of an

object, as I possess this BlackBerry. However, a person need not have actual physical possession, that is, physical custody of an object, in order to be in legal possession of it. If an individual has the ability to exercise substantial control over an object that he does not have in his custody, and the intent to exercise such control, then he is in possession of that article. This is called constructive possession.

Control over an object may be demonstrated by the existence of a working relationship between the person having such control and the person with actual physical custody. The person having control possesses them because he has an effective working relationship with the people who have actual physical custody of them and because he can direct the movement or transfer or disposition of those things. In this manner, for example, a businessman may possess things that are scattered you throughout a number of stores or offices around and about a city or country.

More than one person can have control over the same narcotics. The law recognizes that possession may be sole or joint. If one person alone has actual or constructive possession of a thing, possession is sole. If more than one person has possession of it, as I have defined possession for you, then possession is joint. That is what is meant by "possession.

"Potential with intent to distribute" means that a

defendant possessed the substances with a state of mind or purpose to transfer them to another person.

Since no one can read a defendant's mind, the determination as to a defendant's intent is inferred from his behavior. Basically the question with regard to the intent aspect of the underlying offense is whether any drugs in a defendant's possession, that is, subject to his control in the manner I have indicated, were for his personal use or for the purpose of distribution or delivery to another.

It may be possible to make the determination as to whether drugs were possessed "with intent to distribute," from the quantity of drugs that a defendant may have possessed, although the possession of a large quantity of narcotics does not necessarily mean that the defendant intended to distribute them. On the other hand, a defendant may have intended to distribute a controlled substance even if he did not possess a large amount of it. Other physical evidence, such as paraphernalia for the packaging and processing of drugs, can show an intent to distribute. It might also be evidence of a plan or a scheme to distribute. You should make your decision whether the government has proved beyond a reasonable doubt that the defendants committed the offense charged in Count Three of the indictment from all of the evidence, or the lack of evidence, presented in this case.

Multiple conspiracies.

You must decide whether narcotics conspiracy charged in Count Three of the indictment existed, and if it did, who were some of its members. If you find that the conspiracy charged did not exist, then you must return a not guilty verdict, even though you may find some other conspiracy existed. Similarly, if you find that the defendant was not a member of the conspiracy charged, then you must find the defendant not guilty, even though that defendant may have been a member of some other conspiracy.

If you conclude that the government has proven beyond a reasonable doubt that the conspiracy charged in Count Three of the indictment existed, then you must next determine the second question: Whether the defendants participated in the conspiracy with knowledge of its unlawful purpose and in furtherance of its unlawful objectives.

If you conclude that the government has proven beyond a reasonable doubt that the conspiracy charged in Count Three existed, you must next determine the second question, and that is whether the defendant you are considering participated in the conspiracy willfully, with knowledge of its unlawful purposes and in furtherance of its unlawful objectives. I previously instructed you in my instructions to Count One about determining whether a defendant knowingly became a member of the conspiracy charged. You should apply my instructions from Count One in considering a defendant's membership in the

conspiracy.

In summary, I remind you that on this point, the government must prove by evidence of a defendant's own actions and conduct beyond a reasonable doubt that he knowingly and intentionally entered into the conspiracy, the agreement, with a criminal intent, that is, with a purpose to violate the law, and agreed to take part in the conspiracy to promote and cooperate in one of its unlawful objectives.

I also remind you that the terms "knowingly" and "intentionally" mean that you must be satisfied beyond a reasonable doubt that in joining the conspiracy -- if you find that a defendant did join the conspiracy -- the defendant knew what he was doing -- that he took the actions in question deliberately and voluntarily.

Count Four.

Count Four of the indictment charges all three defendants, specifically, it charges that Raymond Christian, Glenn Thomas and Tyrell Whitaker violated Section 924(j) of Title 18 of the United States Code.

That provision makes it a crime for any person, "In the course of a violation of Section 924(c) to cause the death of a person through the use of the firearm."

As I told you previously, Section 924(c) makes it a crime for any person "during and in relation to any crime of violence or drug trafficking crime to use or carry a firearm or

in furtherance of any such crime to possess a firearm. In particular, Count Four charges that:

"On or about December 15, 2010, in the Southern District of New York, Raymond Christian, also known as Reckless, Tyrell Whitaker, also known as Bow Wow, and Glenn Thomas, also known as Gucci, the defendants, and others known and unknown, willfully and knowingly, during and in relation to a crime of violence for which they may be prosecuted in a court of the United States, namely, the robbery conspiracy, robbery, and attempted robbery charged in Counts One and Two above, did use and carry firearms, and in furtherance of such crimes, did possess firearms and did aid and abet the use, carrying, and possession of firearms, and in the course thereof did cause the death of a person through the use of a firearm, which killing is murder as defined in Title 18, United States Code, Section 1111(a), to wit, the defendants caused the death of Jeffrey Henry, by discharging a firearm at Jeffrey Henry in the vicinity of 54 Chambers Street, Newburgh, New York."

To convict Raymond Christian, Tyrell Whitaker and Glenn Thomas of Count Four, the government must prove each of the following five elements beyond a reasonable doubt:

First, that on or about the dates alleged in the indictment, the charged defendants used or carried or possessed a firearm, or any combination of those acts, or aided and abetted the use carrying or possession of a firearm by another;

Second, that the defendants used or carried the firearm, or aided and abetted the use and carrying of the firearm, during and in relation to the specified crime of violence, or that the defendants possessed a firearm in furtherance of the specified crime of violence;

Third, that the defendants caused the death of a person through the use of a firearm;

Fourth, that the death of that person qualifies as a murder, as I will define that term for you in a moment; and

Fifth, that the defendants acted knowingly and willfully as I have previously defined those formation for you and you should apply those instructions here.

The first element that the government must prove beyond a reasonable doubt on Count Four is that on or about the date set forth in the indictment, the defendants used, carried, or possessed a firearm or aided and abetted the use, carrying, or possession of a firearm.

A firearm under the statute means "any weapon which will or is designed to or may readily be converted to expel a projectile by the action of an explosive. In considering the specific element of whether the defendants used or carried or possessed a firearm, it does not matter whether the firearm was loaded or operable at the time of the crime. Operability is not relevant to your determination of whether a weapon qualifies as a firearm. I instruct you that a gun is a

firearm.

In order to prove that a defendant used a firearm, the government must prove beyond a reasonable doubt an active employment of a firearm by the defendants during and in relation to the commission of the crime of violence. This does not mean that the defendants must actually fire or attempt to fire the weapon, although those would obviously constitute use of the weapon. Brandishing, displaying, or even referring to the weapon so that others present knew that the defendant had the firearm available if needed all constitute use of the firearm. The mere possession of a firearm at or near the site of the crime without active employment as I just described it is not, however, sufficient to constitute use of the firearm.

In order to prove that a defendant carried a firearm, the government must prove beyond a reasonable doubt that the defendant had the weapon within his control so that it was available in such a way that it furthered the commission of the crime. The defendants need not have held the firearm physically, that is, have had actual possession of it on his person. If you find that the defendants had dominion and control over the place where the firearm was located and had the power and intention to exercise control over the firearm, and that the firearm was immediately available to him in such a way that it furthered the commission of the crime of violence, you may find that the government has proven that the defendant

carried the weapon.

Possess.

I have previously instructed you on the meaning of possession, and you should follow those instructions here. To reiterate, neither actual physical custody nor ownership is required to show that a person possesses an object.

Possession of a firearm in furtherance of a crime of violence requires that the defendant possess a firearm and that the possession advance or move forward the crime. The mere presence of a firearm is not enough. Possession in furtherance requires that the possession be incident to and an essential part of the crime. The firearm must have played some part in furthering the crime in order for this element to be satisfied.

The defendants are also charged in Count Four pursuant to the aiding and abetting theory of liability. Accordingly, it would be sufficient for this element if the defendants aided and abetted another person in the use, carrying, or possession of a firearm. I will shortly explain to you the concept of aiding and abetting.

The second element that the prosecution must prove beyond a reasonable doubt that the defendants act used or carried a firearm during and in relation to a crime of violence, or possessed a firearm in furtherance of such a crime.

"In relation to" means that the firearm must have had

some purpose, role, or effect with respect to the crime of violence.

The possession of a firearm in furtherance of a crime of violence requires that the defendants possessed a firearm and that it advanced or moved forward the crime. The mere presence of a firearm is not enough. The possession in furtherance requires that the use, carrying, or possession was incident to and an essential part of the crime. The firearm must have played some part in furthering the crime in order for this element to be satisfied.

I instruct you that, if you find beyond a reasonable doubt that the defendant you are considering participated in the robbery conspiracy alleged in Count One of the indictment, then it qualifies under the law as a crime of violence for which Raymond Christian and Glenn Thomas may be prosecuted in a court of the United States. I additionally instruct you that the attempted robbery charged in Count Two of the indictment qualifies under the law as a crime of violence for which Raymond Christian, Tyrell Whitaker, and Glenn Thomas may be prosecuted in a court of the United States.

As to the third element -- whether the defendants' conduct caused the deaths of the victim -- the defendants' conduct may be found to cause the death of another individual if it such an effect in producing that individual's death as to lead a reasonable person to regard the defendants conduct as a

cause of death. The death of a person may have one or more than one cause. You need not find that a defendant shot the victim or that he committed the final, fatal act. The government need only prove that the conduct of the defendants was a substantial factor in causing the victim's death.

The fourth element of Count Four that the government must prove beyond a reasonable doubt is that the death of the person qualifies as a murder. In considering Count Four, you should apply the following definition of murder, which comes from Section 1111 of the Federal Criminal Code: "Murder is the unlawful killing of a human being, with malice aforethought. Every murder perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious, and premeditated killing, or committed in the perpetration of or attempt to perpetrate certain crimes, including robbery, qualifies as murder."

In this case, the government is proceeding on the last theory of murder, which is also known as felony murder -- that is, that the killing took place while the defendants were perpetrating, or attempting to perpetrate, the robbery on December 15, 2010. To be guilty of felony murder, the defendants, Christian, Thomas and Whitaker, do not have to have set out to commit a murder. It is enough if you determine that the defendants set out to commit the robbery and that the death of the victim occurred during the course of that robbery.

Counts Five and Six, possession of firearm during and in relation to a drug trafficking crime and a crime of violence.

I now want to turn to the firearms offenses charged in the indictment. Note first that Count Five charges all three defendants, whereas Count Six only charges defendants Christian and Thomas, not defendant Whitaker.

Count Five and Six both allege violations of Section 924(c) of the Federal Criminal Code. That provision makes it a crime for any person "during and in relation to any crime of violence or drug trafficking crime, to use or carry a firearm or in furtherance of any such crime to possess a firearm.

Count Five is a firearms count connected to the crimes of violence; namely, the robbery conspiracy or the robbery charged in Counts One and Two, and it charges Raymond Christian, Tyrell Whitaker, and Glenn Thomas as follows:

On or about December 15, 2010, in the Southern District of New York, Raymond Christian, also known as Reckless, Tyrell Whitaker, also known as Bow Wow, Glenn Thomas, also known as Gucci, the defendants, and others known and unknown, during and in relation to a crime of violence for which they may be prosecuted in any court of the United States, namely, the robbery conspiracy, robbery, and attempted robbery charged in Counts One and Two above, knowingly did use and carry firearms and in furtherance of such crimes did possess

firearms and did aid and abet the use and carrying and possession of firearms, which firearms were brandished and discharged.

You have just heard that Count Five by its terms is connected to Counts One and Two in the indictment. This means that you cannot consider Count Five unless you first determine that the defendant in question is guilty of either or both the robbery conspiracy charged in Count One or the robbery charged in Count Two.

Count Six is a firearms count connected to the narcotics conspiracy charged in Count Three of this indictment, and it charges Raymond Christian and Glenn Thomas as follows:

From in or about 2008, through in or about September 2012, in the Southern District of New York, Raymond Christian, also known as Reckless, and Glenn Thomas, also known as Gucci, the defendants, and others known and unknown, during and in relation to a drug trafficking crime for which they may be prosecuted in a court of the United States, namely, the narcotics conspiracy charged in Count Three of this indictment, knowingly did use and carry firearms and in furtherance of such crime did possess firearms and did aid and abet the use and carrying and possession of firearms.

You just heard that Count Six by its terms is connected to Count Three in the indictment. This means that with respect to Raymond Christian and Glenn Thomas, you should

not consider Count Six unless you first determine that the defendant in question is guilty of Count Three.

To be clear, Count Six pertains to the use of a firearm between 2008 and September 2012, but on an occasion other than in connection with the December 15, 2010 robbery at 54 Chambers Street. In short, you may consider the December 15, 2010 robbery only in connection with Counts Three, Four, and Five, but not as evidence of the firearms offense charged in Count Six. In other words, to convict defendants Christian and Thomas on Count Six, you must find, among the other elements I am about to describe, that the defendants possessed a firearm on an occasion other than the December 15, 2010 robbery.

In order to convict the defendants you are considering of the firearms count you are considering, the government must prove the following three elements beyond a reasonable doubt:

First, that on or about the dates alleged in the indictment, the charged defendants used or carried or possessed a firearm or any combination of these acts, or aided and abetted the use, carrying, or possession of a firearm by another.

Second, that the defendants used or carried the firearm or aided and abetted the use and carrying of the firearm during and in relation to the specified crime of violence or the specified drug trafficking crime or that the

defendants possessed a firearm in furtherance of the specified crime of violence or specified drug trafficking crime.

(Continued on next page)

THE COURT: (Continuing) Third, that the defendants acted willfully an knowingly. Again, you should apply the definitions for those terms that I've previously provided to you, pages 13 and 14.

The first element the government must prove beyond a reasonable doubt is that on or about the dates set forth in the indictment the defendants you are considering used, carried or possessed a firearm. I have already instruct you as to the elements and definitions applicable here for the words firearm use, carry, and possess. You should follow my previous instructions on these points.

I remind you that each charged defendant is also charged with aiding and abetting in the firearm count in which he or she is charged; accordingly, it would be sufficient for this element if the defendant you are considering aided and abetted another person in the use, carrying, and possession of a firearm, as I earlier defined those terms for you. I do want, however, to give you an additional instruction that applies to aiding and abetting the use, carrying of, or the possession of a firearm. In order to convict the defendant you are considering of aiding and abetting another's using, carrying out, or possession of a firearm, it is not enough to find that the defendant performed an act to facilitate or encourage the commission of the underlying drug trafficking crime with the knowledge that the firearm would be used or

carried in the commission of that crime. Instead, you must find that the defendant performed some act that facilitated or encouraged the actual using, carrying of, or possession of the firearm in relation to the underlying crime.

For example, if you find that the defendant directed another person to use, carry, or possess a gun in the commission of the underlying crime, or made such a gun available to the other person, then the defendant aided and abetted the other person's use of a firearm. Or, if you find that the defendant was present at the scene during the commission of the underlying drug trafficking crime, you may consider whether that defendant's use -- whether that defendant's conduct at the scene facilitated or promoted the carrying of a gun and thereby aided and abetted the other person's carrying of a firearm. These examples are only offered by way of illustration and are not meant to be exhaustive.

The second element that the government must prove beyond a reasonable doubt with respect to Counts Five and Six is that the defendants used or carried a firearm during and in relation to either (a) a crime of violence or possessed a firearm in furtherance of such crimes as charged in Count Five, or (b) a drug trafficking crime, or possessed the firearm in furtherance of such crimes as such charged in Count Six.

With respect to Count Five, the government must prove

beyond a reasonable doubt that the defendant you are considering used or carried a firearm during and in relation to a crime of violence, or possessed a firearm in furtherance of such crimes. With respect to Count Six, the government must prove beyond a reasonable doubt that the defendant you are considering used or carried a firearm during and in relation to a drug trafficking crime, or possessed a firearm in furtherance of such crimes. Possess in furtherance, as I indicated, requires that the possession be incident to and an essential part of the crime. The firearm must have played some part in furthering the crime in order for this element to be satisfied.

I instruct you that the crimes charged in Count One, the robbery conspiracy charge, and Count Two, the attempted robbery charge, qualify as crimes of violence. I further instruct you that the narcotics conspiracy alleged in Count Three qualifies as a drug trafficking crime.

Special interrogatory.

If, and only if, you find a defendant guilty of one of the enumerated firearms counts I have just explained to you, then you must determine special findings for that defendant on that count. Specifically, you must determine whether during a defendant's use, carrying, or possession of the firearm, he brandished or discharged that firearm, or aided and abetted the same, or whether he did not. You will be provided with a verdict form that will include spaces for you to indicate your

determinations with respect to these issues.

Brandish means that all or part of the weapon was displayed, or the presence of the weapon was otherwise made known to another person, to intimidate that person, regardless of whether the weapon was directly visible to that person. The weapon does not have to be directly visible, but it must be present.

Discharge means to fire or shoot.

Your finding as to brandishing or discharging must be beyond a reasonable doubt. In addition, it must be unanimous in that all of you must agree that the firearm was brandished or discharged. Thus, for example, if all of you agree that a defendant discharged the firearm during the crime, you should indicate "yes" to that question on the verdict sheet. And if you also believe that a defendant brandished the firearm during the crime, you should indicate "yes" to that question as well. If, however, some jurors conclude that the defendant brandished the firearm and the rest of the jurors conclude that he discharged it, you would indicate "no" on both questions because your finding on each determination would not be unanimous.

I want to now instruct you on the concept of aiding and abetting, which you have heard me refer to earlier in my instructions.

In connection with the charges contained in Counts

Two, Four, Five, and Six of the indictment, the defendants are charged with committing certain criminal acts, and also with aiding and abetting the commission of these acts, in violation of Title 18, United States Code, Section 2. As to each of those crimes, the defendant you are considering can be convicted either if he committed the crime himself or if he aided and abetted the commission of the crime by one or more people. It is not necessary for the government to show that the defendant himself physically committed a crime in order for you to find him guilty. If you do not find beyond a reasonable doubt that the defendant physically committed a crime, you may, under certain circumstances, still find him guilty of the crime as an aider and abettor.

A person who aids and abets another to commit an offense is just as guilty of that offense as if he had committed it himself. Therefore, if you find that the government has proven beyond a reasonable doubt that another person actually committed a crime, and that the defendant you are considering aided and abetted that person in the commission of the offense, then you may find the defendant guilty of that crime.

As you can see, the first requirement is that another person has committed the crime charged. Obviously, no one can be convicted of aiding and abetting the criminal acts of another if no crime was committed by another person. But if

you do find that a crime was committed, then you must consider whether the defendant aided or abetted the commission of the crime. In order to aid and abet another to commit a crime, it is necessary that the defendant you are considering willfully and knowingly associated himself in some way with the crime, and that he willfully and knowingly sought by some act to help make the crime succeed.

To determine whether the defendant aided and abetted the commission of the crime with which he is charged, ask yourself these questions. Did he participate in the crime charged as something he wished to bring about?

Did he associate himself with the criminal venture knowingly and willfully?

Did he seek by his actions to make the criminal venture succeed?

If the government proves beyond a reasonable doubt that the defendant you are considering did all three of these things, then the defendant is an aider and abettor, and therefore guilty of the offense. If he did not, then the defendant is not an aider and abettor and he is not guilty of the offense.

Now you have heard reference, in the arguments and cross-examination of the defense counsel in this case, to the fact that certain investigative techniques were not used by the government. There is no legal requirement, however, for the

government to prove its case through any particular means. While you are to carefully consider the evidence adduced by the government, you are not to speculate as to why they used the techniques they did or why they did not use other techniques. Your concern is to determine whether, on the evidence or lack of evidence, each defendant's guilt has been proven beyond a reasonable doubt.

Now, there are people whose names you have heard during the course of the trial but did not appear to testify. One or more of the attorneys has referred to their absence from the trial. I instruct you that each party had an equal opportunity or lack of opportunity to call any of these witnesses. Therefore, you should not draw any inferences or reach any conclusions as to what they would have testified to had they been called. Their absence should not affect your judgment in any way.

You should remember my instructions, however, that the law does not impose on a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

Accomplice or cooperating witness testimony.

You have heard from witnesses who testified that they committed crimes. Some of these witnesses testified pursuant to a cooperation agreement with the government, while other witnesses testified at this trial pursuant to a grant of

immunity, which in this case means that the government cannot use their testimony against them in a future prosecution. Let me say a few things that you should consider during your deliberations on the subject of the testimony of cooperating and immunized witnesses.

The government argues, as it is permitted to do, that it must take the witnesses as it finds them. It argues that only people who themselves take part in criminal activity have the knowledge required to show criminal behavior by others. For those very reasons, the law allows the use of accomplice testimony. Indeed, it is the law in federal courts that the testimony of even one accomplice may be enough in itself for conviction, if the jury finds that the testimony establishes guilt beyond a reasonable doubt.

On the other hand, it is also the case that testimony from cooperating witnesses or witnesses who have been immunized is of such nature that it must be scrutinized with great care and viewed with particular caution when you decide how much, if any, of the testimony to believe.

In evaluating the testimony of cooperating and immunized witnesses, you should ask yourselves whether the witness would benefit more by lying, or by telling the truth. Was his or her testimony made up in any way because he or she believed or hoped that he or she would somehow receive favorable treatment by testifying falsely? Or did he or she

believe that his or her interests would be best served by testifying truthfully? If you believe that the witness was motivated by hopes of personal gain, was the motivation one that would cause him or her to lie, or was it one that would cause him or her to tell the truth? Did this motivation color his or her testimony?

If you find that the testimony was false, you should reject it. However, if, after a cautious and careful examination of the cooperating witness's testimony and demeanor upon the witness stand, you are satisfied that the witness told the truth, you should accept it as credible and act upon it accordingly.

If you find that a witness is intentionally telling a falsehood, that is always a matter of great importance you should weigh carefully. If you find that any witness has willfully testified falsely as to any material fact -- that is, as to an important matter -- the law permits you to disregard completely the entire testimony of that witness upon the principle that one who testifies falsely about one material fact is likely to testify falsely about everything. You are not required, however, to consider such a witness as totally unbelievable. You may accept so much of his or her testimony as you deem true and disregard what you feel is false.

You have also heard testimony that one of the witnesses pled guilty to charges arising out of the same facts

that are at issue in this case. You are instructed that you are to draw no conclusions or inferences of any kind about the guilt of the defendants on trial from the fact that a government witness pled guilty to similar charges. The decision of that witness to plead guilty was a personal decision that the witness made about his own guilt. It may not be used by you in any way as evidence against or unfavorable to the defendants on trial here.

Additionally, I must caution you that it is no concern of yours why the government made an agreement with a witness or why a witness was granted immunity. Your sole concern is whether a witness has given truthful testimony here in this courtroom before you.

Use of informants.

There has been testimony before you about the use of informants. Informants are frequently used by the government to obtain leads and to gain introduction to people suspected of violating the law. There are certain types of crimes where, without the use of informants, detection would be extremely difficult. Because this law enforcement technique is entirely lawful, your personal view on its use -- whether you approve or disapprove -- is beside the point and must not affect your evaluation of the evidence in the case.

Let me put it another way. If you are satisfied beyond a reasonable doubt that the defendant you are

considering committed the charged offense that you are considering, you should find him guilty even though you believe that his arrest came about in some measure by the government's use of informants.

Use of evidence obtained pursuant to searches.

You have heard testimony about evidence seized in various searches, and searches at the time of arrest.

Evidence obtained from those searches was properly admitted in this case, and may be considered by you. Indeed, such searches are entirely appropriate law enforcement actions. Whether you approve or disapprove of how the evidence was obtained should not enter into your deliberations, because I instruct you that the government's use of the evidence is entirely lawful.

You must, therefore, regardless of your personal opinions, consider such evidence as you would any other evidence in this case, and make your determination as to its meaning and significance, if any, in evaluating whether the government has proven each defendant's guilt beyond a reasonable doubt.

Use of recordings.

Audio and video recordings of various telephone conversations and meetings and transcripts of those recordings have been admitted into evidence. You were also provided with transcripts as an aid, but it is the recordings that are in

evidence. Whether you approve or disapprove of the recording of those conversations may not enter into your deliberations. I instruct you that these recordings were made in a lawful manner and that no one's rights were violated, and that the government's use of this evidence is entirely lawful and it was properly admitted into evidence at this trial.

You must, therefore, regardless of any personal opinions, consider such evidence as you would any other evidence in the case, and make your determination as to its meaning and significance, if any, in evaluating whether the government has proved beyond a reasonable doubt the guilt of the defendants. If you wish to hear any of the tapes again or see any of the transcripts of those recordings, they will be made available to you during your deliberations.

Transcripts of tape recordings.

The government has been permitted to hand out typed documents that it prepared containing the government's interpretation of what appears on the tape recordings which have been received as evidence. Those were given to you as an aid or guide to assist you in listening to the tapes. However, they are not in and of themselves evidence. Therefore, when the tapes were played I advised you to listen carefully to the tapes themselves. You alone should make your own interpretation of what appears on the tapes based on what you heard. If you think you heard something differently than

appeared on the transcript, then what you heard is controlling.

Let me say, again, you the jury are the sole judges of the facts.

Redaction of evidentiary items.

We have, among the exhibits received in evidence, some documents, recordings and transcripts that are redacted. Redacted means that a part of the document or tape was blacked out or removed. Certain redactions have been made in the documents, transcripts, and from some recordings at the direction of the court. You should draw no adverse inference against either party as a result of these redactions, nor should you speculate on what may have been redacted. You are to concern yourself only with the part of the items that has been admitted into evidence, that is, the nonredacted portions.

Similar acts and prior act evidence.

You have heard evidence that on an earlier occasion the defendants engaged in conduct similar in nature to the conduct charged in the indictment. Let me remind that the defendant is only on trial for committing the acts alleged in the indictment. Accordingly, you may not consider this evidence of similar acts as a substitute for proof that a defendant committed the crime charged. Nor may you consider this evidence as proof that a defendant has a criminal propensity or bad character. This evidence was admitted for a more limited purpose, and you may consider it for that purpose

only.

Nevertheless, the evidence of similar conduct is to be considered by you only on the issues I have just mentioned, and not on any other issues. You may not consider such evidence for any other purpose. Specifically, you may not consider it as evidence that the defendant you are considering is of bad character or has a propensity to commit a crime.

Persons not on trial.

You may not draw any inference, favorable or unfavorable, towards the government or any defendant from the fact that any person was not named as a defendant in this case, and you may not speculate as to the reasons why other people are not on trial before you now. Those matters are wholly outside your concern and have no bearing on your function as jurors in deciding the case before you.

Venue.

In addition to all of the elements that I have described for you for each of the six counts, you must also find whether the crimes charged in the indictment took place at least in part within the Southern District of New York, which includes Newburgh, New York. In this regard, I instruct you that it is undisputed in this case that venue is proper in the Southern District of New York.

Now to part three, the evaluation of the evidence.

What is and is not evidence?

You are to consider only the evidence in the case. The evidence in this case is the sworn testimony of the witnesses, the exhibits received in evidence, and the stipulations to which the parties have agreed.

In this case you have heard evidence in the form of two types of stipulations.

A testimonial stipulation is an agreement upon the parties that, if called, a witness would give certain testimony. You must accept as true that had the witness testified, he or she would have given the stipulated testimony. However, it is for you to determine the effect or weight to be given to that testimony.

You also heard evidence in the form of fact stipulations. A fact stipulation is an agreement between the parties that the stipulated facts are true. You must accept as true the facts contained in these stipulation. However, it is for you to determine the weight to be given to those facts.

It is for you alone to decide the weight, if any, to be given to the testimony and stipulations you have heard and the exhibits you have seen. Testimony that I have excluded or stricken is not evidence and may not be considered by you in rendering your verdict.

You are not to consider as evidence the questions asked by the lawyers. It is the witnesses' answers that are evidence, not the questions. Arguments by the attorneys are

not evidence because the attorneys are not witnesses. What they have said to you in their opening statements and their summations is intended to help you understand the evidence to reach your verdict. If, however, your recollection of the evidence differs from the statements made by the advocates in their opening statements or summations, it is your recollection that controls.

Finally, any statements or rulings that I may have made do not constitute evidence. Because you are the sole and exclusive judges of the facts, I do not mean to indicate any opinion as to what the facts are or what the verdict should be. The rulings I have made during the trial are not any indication of my views. Also, you should draw no inference from the fact that I may on occasion have asked certain questions of witnesses. Those questions were intended only to clarify or expedite, and are not an indication of my view of the evidence. In short, if anything I have said or done seemed to you to indicate an opinion relating to any matter you need to -- relating to any matter you need to consider, you must disregard it. Let me read that again. In short, if anything I have said or done seemed to you to indicate an opinion relating to any matter you need to consider, you must disregard it.

Direct and circumstantial evidence.

There are two types of evidence that you may properly consider in reaching your verdict. One type of evidence is

direct evidence. One kind of direct evidence is a witness's testimony about something he knows by virtue of his or her own senses -- something the witness has seen, felt, touched, or heard. Direct evidence may also be in the form of an exhibit.

The other type of evidence is circumstantial evidence. Circumstantial evidence is evidence that tends to prove one fact by proof of other facts. Here is a simple example of circumstantial evidence:

Assume that when you came into the courthouse this morning the sun was shining and it was a nice day. Assume that the courtroom blinds are drawn and you cannot look outside. As you were sitting here, someone walks in with an umbrella that is dripping wet. Somebody else then walks in with a raincoat that is also dripping wet.

You cannot look outside the courtroom and you cannot see whether or not it is raining. So you have no direct evidence of that fact. But on the combination of the facts that I have asked you to assume, it would be reasonable and logical for you to conclude that between the time you arrived at the courthouse and the time those people walked in, it had started to rain.

That is all there is to circumstantial evidence. You infer on the basis of reason and experience and common sense from an established fact the existence or nonexistence of some other fact.

Many facts, such as person's state of mind, can only rarely be proved by direct evidence. Circumstantial evidence is of no less value than direct evidence. The law makes no distinction between the two, but simply requires that before convicting a defendant you, the jury, must be satisfied of the defendant's guilt beyond a reasonable doubt from all of the evidence in the case.

Inferences.

I have used the term infer, and the lawyers in their arguments have asked you to draw inferences. When you draw an inference, you conclude, from one or more established facts, that another fact exists, and you do so on the basis of your reason, experience, and common sense. The process of drawing inferences from facts in evidence is not a matter of guesswork, suspicion, or speculation. An inference is a reasoned, logical deduction or conclusion that you, the jury, may draw -- but are not required to draw -- from the facts which have been established by either direct or circumstantial evidence. In considering inferences, you should use your common sense and draw from the facts which you find to be proven whatever reasonable inferences you find to be justified in light of your experience.

Credibility of witnesses.

Now for the important subject of evaluating testimony. How do you evaluate the credibility or believability of the

witnesses? The answer is that you use your plain common sense. There is no magic formula by which you can evaluate testimony. You should use the same tests for truthfulness that you would use in determining matters of importance in your everyday lives. You should ask yourselves. Did the witness impress you as honest, open, and candid, or was the witness evasive and edgy as if hiding something? How did he or she appear -- that is, his or her bearing, behavior, manner and appearance -- while testifying? How responsive was the witness to the questions asked on direct examination and on cross-examination? You should consider the opportunity the witness had to see, hear, and know about the things which he or she testified, the accuracy of his or her memory, his or her candor or lack of candor, his or her intelligence; the reasonableness and probability of his or her testimony; its consistency or lack of consistency with other credible evidence; and its corroboration or lack of corroboration by other credible evidence.

In short, in deciding credibility you should size up the witness in light of his or her demeanor, the explanations given, and all of the other evidence in the case. Always remember to use your common sense, good judgment, and life experience.

Few people recall every detail of every event precisely the same way. A witness may be inaccurate, contradictory, or even untruthful in some respects, and yet

entirely believable and truthful in other respects. It is for you to determine whether such inconsistencies are significant or inconsequential.

If you find that a witness is intentionally telling a falsehood, that is always a matter of importance and you should weigh it carefully. If you find that a witness has willfully testified falsely as to any material fact -- that is, as to an important matter -- the law permits you to disregard completely the entire testimony of that witness upon the principle that one who testifies falsely about one material fact is likely to testify falsely about everything. You are not required, however, to consider such a witness as totally unbelievable. You may accept so much of his or her testimony as you deem true and disregard what you feel is false.

You are not required to accept testimony even though the testimony is uncontradicted and the witness's testimony is not challenged. You may decide because of the witness's bearing or demeanor, or because of the inherent improbability of that testimony, or for other reasons sufficient to yourselves that the testimony is not worthy of belief. On the other hand, you may find, because of a witness's bearing and demeanor and based upon your consideration of all of the other evidence in the case, that the witness is truthful.

By the processes which I have just described to you, you, as the sole judges of the facts, decide which of the

witnesses you will believe, what portion of the testimony you will accept, and what weight you will give to it.

Bias of witnesses.

In deciding whether to believe a witness, you should also specifically note any evidence of bias, hostility, or affection that the witness may have towards one of the parties. Likewise, you should consider evidence of any other interest or motive that the witness may have in cooperating or not cooperating with a particular party. If you find any such bias, hostility, affection, interest, or motive, you must then consider whether or not it affected or colored the witness's testimony.

You should also take into account any evidence that a witness may benefit or suffer in some way from the outcome of the case. Such interest in the outcome may create a motive to testify falsely, and may sway a witness to testify in a way that advances his or her own interests. Therefore, if you find that any witness whose testimony you are considering may have an interest in the outcome of this trial, then you should bear that factor in mind when evaluating the credibility of his or her testimony, and accept it with great care.

Keep in mind, though, that it does not automatically follow that testimony given by an interested witness is to be disbelieved. There are many people who, no matter what their interest in the outcome of the case may be, would not testify

falsely. It is for you to decide, based on your own perceptions and common sense, to what extent, if at all, the witness's bias or interest has affected his or her testimony. You are not required to disbelieve an interested witness; you may accept as much of his or her testimony as you deem reliable and reject as much as you deem unworthy of acceptance.

Law enforcement witnesses.

You have heard testimony of some witnesses who were law enforcement officers during the events at issue in this trial. The fact that a witness is or was employed by the government does not mean that his or her testimony is deserving of more or less consideration or greater or lesser weight than that of any other witness. At the same time, it is quite legitimate for a defense counsel to try to attack the credibility of a law enforcement witness on the grounds that his testimony may be colored by a personal or professional interest in the outcome of the case. It is your decision, after reviewing all the evidence, whether to accept or reject the testimony of the witness and to give to that testimony whatever weight you find it deserves.

Impeachment by prior inconsistent statement.

You have heard evidence that a witness made a statement on an earlier occasion which counsel argues is inconsistent with the witness's trial testimony. Evidence of a prior inconsistent statement is not to be considered by you as

affirmative evidence bearing on whether the government has proven the defendant guilty beyond a reasonable doubt. Evidence of a prior inconsistent statement was placed before you for the more limited purpose of helping you to decide whether to believe the trial testimony of the witness who contradicted himself or herself. If you find that the witness made an earlier statement that conflicts with his or her trial testimony, you may consider that fact in deciding how much of his trial testimony, if any, to believe.

In making this determination, you may consider whether the witness purposely made a false statement or whether it was an innocent mistake; whether the inconsistency concerns an important fact, or whether it had to do with a small detail; whether the witness has an explanation for the inconsistency; and whether that explanation appealed to your common sense.

It is exclusively your duty, based on all the evidence and your good judgment, to determine whether the prior statement was inconsistent and if so how much, if any, weight to be given to the inconsistent statement in determining whether to believe all or part of the witness's testimony.

Defendants' right not to testify.

As you know, the defendants did not testify in this case. Under our constitution, a defendant has no obligation to testify or to present any evidence, because it is the government's burden to prove the defendant guilty beyond a

reasonable doubt. That burden remains with the government throughout the entire trial and never shifts to the defendant. A defendant is never required to prove that he is innocent.

You may not attach any significance to the fact that the defendants did not testify. No adverse inference against the defendant may be drawn by you because he did not take the witness stand. You may not consider this against the defendants in any way in your deliberations in the jury room. There are many reasons why an innocent person may choose not to testify.

Preparation of witnesses.

You have heard evidence during the trial that witnesses have discussed the facts of the case and their testimony with the lawyers before the witness appeared in court.

Although you may consider that fact when you are evaluating a witness's credibility, I should tell you that there is nothing either unusual or improper about a witness meeting with lawyers before testifying so that the witness can be aware of the subjects he will be questioned about, focus on those subjects, and have the opportunity to review relevant exhibits before being questioned about them. Such consultation helps to conserve your time and the court's time. In fact, it would be unusual for a lawyer to call a witness without such consultations.

Again, the weight you give to the fact or the nature of the witness's preparation for his or her testimony and what inferences you draw from such preparation are matters completely within your discretion.

Rulings on evidence and objections.

It is the duty of the attorney for each side of a case to object when the other side offers testimony or other evidence which the attorney believes is not admissible. Counsel also have the right and duty to ask the court to make rulings of law. All those questions of law must be decided by me. You should not show any prejudice against an attorney, or his or her client, because the attorney objected to the admissibility of evidence, or asked for a conference out of the hearing of the jury, or asked the court for a ruling on the law.

As I have already indicated, my rulings on the admissibility of evidence does not indicate any opinion about the weight or effect of such evidence. You are the sole judges of the credibility of all of the witnesses and the weight and effect of all evidence; if, however, I sustained an objection to any evidence or ordered evidence stricken, that evidence must be entirely ignored.

Expert testimony.

You have heard what is called expert testimony from Mr. Myers, a forensic scientist, and Dr. Ely, a medical

examiner. An expert is allowed to express an opinion on those matters about which he or she has special knowledge and training. Expert testimony is presented to you on the theory that someone who is experienced in the field can assist you in understanding the evidence or in reaching an independent decision on the facts.

In weighing an expert's testimony, you may consider the expert's qualifications, opinions, reasons for testifying, as well as all of the other considerations that ordinarily apply when you are deciding whether or not to believe a witness's testimony. You may give the expert testimony whatever weight, if any, you find it deserves in light of all the evidence in this case. You should not, however, accept a witness's testimony merely because he or she is an expert. Nor should you substitute your own reason, judgment, and common sense. The determination of the facts in this case rests solely with you.

Sympathy or bias.

Under your oath as jurors you are to evaluate the evidence calmly and objectively, without sympathy or prejudice. You are to be completely fair and impartial. You are to be guided solely by the evidence in this case, and the crucial, bottomline question that you must ask yourselves as you sift through the evidence is: Has the government proven the elements of the crimes charged beyond a reasonable doubt?

It would be improper for you to consider, in deciding the facts of the case, any personal feelings you may have about the race, national origin, sex, disability, or age, of any party or witness, or any other such irrelevant factor. It would be equally improper for you to allow any feelings you might have about the nature of the crimes charged to interfere with your decision-making process. All parties are entitled to the same fair trial at your hands. They stand equal before the law, and are to be dealt with as equals in this court. If you let fear or prejudice or bias or sympathy interfere with your thinking, there is a risk that you will not arrive at a true and just verdict.

Punishment.

The question of possible punishment of the defendants must not enter into or influence your deliberations. The duty of imposing a sentence rests exclusively upon the court. Your function is to weigh the evidence in the case and to determine whether or not each defendant is guilty beyond a reasonable doubt, solely upon the basis of each evidence. Under your oath as jurors, you cannot allow a consideration of the punishment which may be imposed upon a defendant, if he is convicted, to influence your verdict in any way, or in any sense enter into your deliberations.

Now for the final section concerning deliberations.

The duty to deliberate. Unanimous verdict.

You will now retire to decide the case. It is your duty as jurors to consult with one another and to deliberate with a view to reaching an agreement. Each of you must decide the case for yourself, but you should do so only after consideration of the case with your fellow jurors. Your verdict, and the answers to each question on the verdict form, must be unanimous.

Discuss and weigh your respective opinions dispassionately, without sympathy, prejudice, or favor toward either party, and adopt that conclusion which in your good conscience appears to be in accordance with the truth.

As you deliberate, please listen to the opinions of your fellow jurors and ask for an opportunity to express your own views. Every juror should be heard. No one juror should hold center stage in the jury room, and no one juror should control or monopolize the deliberations. You should all listen to one another with courtesy and respect. If, after stating your own view, and if after listening to your fellow jurors, you become convinced that your view is wrong, do not hesitate because of stubbornness or pride to change your view. On the other hand, do not surrender your honest convictions and beliefs concerning the weight or effect of the evidence solely because of the opinions of your fellow jurors or because you are outnumbered or for the mere purpose of returning a verdict. Your final vote must reflect the conscientious belief as to how

the issues should be decided. Your verdict must be unanimous.

You are not to discuss the case until all the jurors are present. Nine or ten or even eleven jurors together is only a gathering of individuals. Only when all jurors are present do you constitute a jury, and only then may you deliberate.

If you took any notes during the course of the trial, you should not show you notes to others or discuss your notes with any other juror during your deliberations. Any notes you have taken are to be used solely to assist you. The fact that a particular juror has taken notes entitles that juror's views to no greater weight than those of any other juror. Further, your notes are not to substitute for your recollection of the evidence in the case.

Right to see exhibits and hear testimony and communications with the court.

The documentary, but not the physical or audio visual exhibits, will be sent to you in the jury room. If you want any of the testimony read back to you, that can be arranged. Please appreciate that it is not always easy to locate the testimony that you might want, so be as specific as you possibly can as to what witness and what portion of that witness's testimony you would like to hear.

Any communication with the court should be made in writing, signed by your foreperson, and given to the marshal

who will be outside the jury room door while you deliberate. I will respond to any questions or requests you have as promptly as possible, either in writing, or by having you return to the courtroom so that I can speak with you in person. In any event, do not tell me or anyone else how the jury stands on any issue until after a unanimous verdict is reached. So do not ever indicate, in a note or otherwise, what the vote is or which way the majority is leaning or anything like that.

Duties of the foreperson.

Your first task when you retire to deliberate is to select by your own vote one of you to sit as your foreperson. The foreperson does not have anymore power or authority than any other juror, and his or her vote or opinion does not count for anymore than any other juror's vote or opinion. The foreperson is merely your spokesperson to the court. He or she will send out any notes, and when the jury has reached a verdict, he or she will notify the marshal that the jury has reached a verdict, and he or she will come into open court and give the verdict.

Verdict form.

The foreperson will receive a verdict form on which to record your verdict. It lists the questions that you must resolve based on the evidence and the instructions that I have given you. When the foreperson has completed the form, he or she must sign his or her name and the form will be marked as a

court exhibit.

I do note that each of you has a copy of the verdict form. Only one should be filled out and signed by the foreperson.

Now, closing comments.

The most important part of this case, Members of the Jury, is the part you as jurors are about to play as you deliberate on the issues of fact. It is for you and you alone to decide whether the government has proved beyond a reasonable doubt each of the essential elements of the crimes to which the defendants are charged. If the government has succeeded on a particular count with regard to a defendant you are considering, your verdict should be guilty as to that count. If it has failed, your verdict should be not guilty.

I know you will try the issues that have been presented to you according the oath you have taken as jurors. In that oath you promised that you would well and truly try the issues in this case and render a true verdict according to the law and the evidence, impartially and fairly without prejudice or sympathy. Your function is to weigh the evidence in the case and determine whether the government has proved beyond a reasonable doubt the guilt of the defendants of the crimes charged in the indictment.

As I have previously stated, your verdict must be unanimous. Again, if at any time you are not in agreement, you

are not to reveal the standing of the jurors -- that is the split of the vote -- to anyone, including me, at any time during your deliberations.

Members of the Jury, I ask for your patience for a few moments longer because I do need to speak with the lawyers at sidebar. I ask you to remain in the jury box without speaking to one another and I will return in just a moment.

(Continued on next page)

(At the sidebar)

THE COURT: Any objections or misstatements?

MR. BUCHWALD: Yes, your Honor.

Incorporating by reference all of the arguments made yesterday with respect to our rejected proposed charges or objections, we do incorporate those by reference. Two additional comments.

With respect to Count Six the firearms charge relating to the narcotics conspiracy. It is our belief that your Honor should instruct that the jury in order to convict any charged defendant with that count must be unanimous as to the particular firearm which it believes was possessed in relationship to the narcotics offense. There can't be a situation where six of them believe it was one firearm on one occasion and six others believe it was a different firearm on another occasion. They must be unanimous as to the particular event.

THE COURT: Mr. Bauer.

MR. BAUER: I think the charge is adequate as is.

THE COURT: I agree.

MR. BUCHWALD: I'm sorry.

THE COURT: He says he believes the charge is adequate and I agree so I will not further instruct the jury in that regard.

MR. BUCHWALD: One other comment. The last sentence

on page 14 states, in fact, even a single act may be sufficient to draw a defendant within the scope of the conspiracy.

To the extent that this sentence is then incorporated into the subsequent conspiracy charge as it is, the narcotics conspiracy, we believe it is in error or at least misleading and should be balanced with the statement that should occur only if the single instance gives rise to a proper inference that the larger conspiracy existed.

THE COURT: That I take it to be a restatement of the challenges previously made.

MR. BUCHWALD: I think so.

MR. GOLTZER: And those prior challenges are made on behalf of all defendants with respect to counts that relate to them and we respectfully except to the present failure to include.

THE COURT: Very well. So noted. Anything further?

(Continued on next page)

(In open court)

THE COURT: At this time, the regular jurors, that is to say jurors numbers one through twelve, will begin their deliberations in this case. Nevertheless, the alternate jurors are not quite excused. While the jury conducts its deliberations you do not have to be in court, but you should give Ms. Rivera your phone numbers where you can be reached because it is possible that one or more of you could be needed to deliberate if a regular juror is unable to continue.

Ms. Rivera will call you if deliberations are completed without our needing you so that you will know that you are completely finished. Between now and that time, however, you must continue to observe all restrictions I have instructed you on throughout the trial; that is, you must not discuss the case with anyone, including your fellow alternate jurors, the regular jurors, other people involved in the trial, members of your family, friends, coworkers, or anyone else. You may not communicate with anyone about the case on your cellphone, through e-mail, BlackBerry, iPhone, text messaging or on Twitter, through any blog or website, through any internet chatroom, or by way of any other social networking websites, including Facebook, MySpace, LinkedIn and YouTube. Do not speak at all with any of the parties, the witnesses, or the attorneys. Do not permit anyone to discuss the case with you. Do not friend or follow one another or any participant in

this trial on Facebook, Twitter, LinkedIn, MySpace, Pinterest, Friendster, or any other social networking website. Do not even remain in the presence of anyone discussing the case. If anyone approaches you or tries to talk to you about the case, please report that to me through Ms. Riviera immediately.

Do not listen to or watch or read any news reports concerning this trial, if there were to be any. Do not do any research on the internet or otherwise; do not visit any places mentioned during the course of the trial or conduct any kind of investigation on your own, including on social media, such as Facebook, LinkedIn, MySpace and the like. Should you be asked to participate in reaching a verdict in this case, the only information you will be allowed to consider in deciding this case is what you learned in this courtroom during the trial.

I am sorry that you will probably miss the experience of deliberating with the jury, but the law provides for a jury of twelve persons in this case. So before the rest of the jury retires into the jury room, if you have any clothing or objects there, you are asked to pick them up and to withdraw and come back into the courtroom before any the deliberations start.

So do either of you three gentlemen have anything in the jury room? Then can you please go and get that now.

While that is happening, ladies and gentlemen, my intention so to maintain our regular workday, which means that you can deliberate until 5:00; or if you let us know, we can

stay long as you'd like. You're not sequestered in a federal trial. So my intent is that we meet again, that we stop at 5:00, unless you say otherwise, meeting tomorrow morning at 9:30 or work until 5:00 or as long as you'd like tomorrow. Okay.

Will the court security officer please step forward.

(Court security officer sworn)

THE COURT: Ladies and gentlemen, you should now begin to deliberate. You may now discuss the case.

(At 4:06 p.m. the jury retired to deliberate)

THE COURT: Gentlemen, thank you for your service so far. And we will be in contact with you one way or the other. Have a good day.

(Alternates excused)

(Recess pending verdict)

(At 5:02 p.m., a note was received from the jury)

THE COURT: We have a note. It will be marked Court Exhibit 1. It reads as follows: All going home. 5:00.

All going home 5:00.

Request 8-7, Anthony Baynes' testimony.

He testified over a number of days, correct?

MR. BAUER: He did.

THE COURT: What was 8-7?

MR. DRATEL: Part of the cross.

MS. STAFFORD: He was taken out of order.

THE COURT: So that was the Thursday?

MR. GOLTZER: That's direct and part of the cross.

THE COURT: So I guess I would want to know what they mean by 8-7. Do the they want just the testimony for that day, so the entire testimony for that day? That seems a bit preposterous.

MR. GOLTZER: Not if it's my cross.

THE COURT: Correct.

So I'll ask for some clarification and then obviously we'll tell them that they can go home.

MR. BAUER: He started 8-7.

THE COURT: He did. He was after Fredericks.

MR. GOLTZER: A lot of direct.

MR. BAUER: Mostly the direct.

(Jury present)

THE COURT: Please be seated afternoon.

Ladies and gentlemen, we have received your note. It will be labeled Court Exhibit No. 1. It reads in its entirety as follows: All going home. 5:00. Request 8-7, Anthony Baynes' testimony.

So, a question about that. On 8-7 Anthony Baynes provided his direct examination. And the cross-examination was begun by Mr. Goltzer. It was not finished on that day. So the question for you is what do you want -- well, do you want exactly what you said, which is everything that he testified to

on the 7th? Or do you want something less than that? Or do you want something more than that?

And you don't have to -- you don't have to decide it here. You can go back and quickly let us know, but I just want to make sure that you get what you asked for.

The other thing that I wanted to tell you was, again, we'll start tomorrow morning at 9:30. We won't necessarily bring you out to get you started but you should absolutely wait until all twelve of you are in the jury room before you begin to deliberate because you're not a jury unless you're twelve. And what that means, in addition, if one of you wants to take a break and go outside and smoke a cigarette, make a call, the rest of you can't deliberate while that person is outside of the jury room.

Also be aware that in addition to the breakfast you will also be provided with lunch. So you will be in the room through lunch as well. And that I will give the lawyers an opportunity to have lunch. So likely between 12:30 and 1:30 I'll let them go have lunch. And I say that to you because in the event have you a note during that period of time we may not get back to you as quickly we would want. So do be aware of that.

So why don't you just retire for just a second to let us know whether we should give you precisely what you asked for in this note or whether you were meaning something else. Okay.

(Jury excused)

THE COURT: Also, I was speaking with the court reporter concerning in the event -- whatever it is they wanted it sounds like they want a good chunk. I would propose that the parties get together, prepare the transcript, that is to say give them a form of the transcript that has redacted out the objections and the sidebars so that we can give it to them rather than bring them out and have the court reporter read it to them. It's faster for them. It's more efficient for us, obviously. Any objection to that?

MR. BUCHWALD: How many copies if it's going in there, several copies?

MR. GOLTZER: Give them twelve copies?

THE COURT: I was thinking we'd give them one copy but, again, I have not done this in the past so I'm happy to take --

MR. BAUER: I think twelve copies is environmentally wasteful. Some number -- somewhere between one and twelve, maybe kind of arbitrary, but I think twelve is a little much.

By the way, Judge, just so you know. We anticipated a note about Baynes' testimony. So we already have a version of his entire testimony redacted. So we can make this very efficient. We can actually e-mail it to defense counsel tonight and they can review it and give us any comments so it will be ready by 9:30 tomorrow. Or whatever portion they ask

for.

THE COURT: Okay. Perfect.

And you'll make the copies?

MR. BAUER: We will make the copies. But I would propose that we do three. That's, admittedly, a random number. But three. If they ask for more, then we'll do more. But I don't want to do twelve unless they ask for it, also the court tells us to do it.

MR. GREENFIELD: If there was a read back they'd have twelve. I don't want one juror hogging it in there. Every juror should have the same access. It should be twelve.

THE COURT: Well we only give them one set of the exhibits for example. So I don't know if there's any magic necessarily -- I don't think we need to give them twelve. Let's see what they ask for.

(At 5:20 p.m., a note was received from the jury)

THE COURT: Okay.

Court Exhibit No. 2. Evidence request. I'll read it.

Evidence request. 8-7, Anthony Baynes' testimony as recorded by court reporter.

8-11. Cross-exam. Baynes (two parts)

8-12. Cross-exam. Baynes.

8-12. Jamar Mallory testimony.

8-13. Jamar Mallory testimony continued.

Transcripts Kevin Gotti video.

8-14. Mallory testimony continued.

8-18. Jamar Mallory cross-exam.

8-18. Tarrence Smith testimony.

8-18. Danielle Williams.

8-19. Akinto Boone testimony.

8-19. David Evans/Fuzzy testimony.

8-19. Ramone McDermott testimony.

12-15-10. 911 call. Joker.

MR. GOLTZER: Aren't you glad we asked for clarification.

MR. BUCHWALD: One thing. The transcript isn't evidence, the transcript of the Mallory/Burden tape is not evidence.

MR. NAWADAY: That's correct. They can only come out and have the portions of the video played for them and have the transcripts there I guess as an aid.

THE COURT: I don't understand what they mean when they say -- apparently they're working off of someone's notes. So that 8-11 cross-exam Baynes two parts.

MR. GOLTZER: They may have taken a witness out of order.

THE COURT: So it sounds like they want the entirety of Baynes, Mallory, Smith, Williams, Boone, Evans, and McDermott.

Correct?

MR. GOLTZER: Correct.

THE COURT: Have you anticipated this request?

MR. BAUER: We have Baynes and Mallory. We were close.

THE COURT: So let's bring them out, ask them if this is really -- I'm not sending twelve.

MR. GOLTZER: Don't ask again they might ask for Daniel Myers.

THE COURT: So let's bring them out.

MR. BUCHWALD: Do you want to ask them how many copies?

(Jury present)

THE COURT: Everyone can be seated.

The way that I and the parties interpret this note is that you want the entirety of the testimony of Mr. Baynes, Mr. Mallory, Tarrence Smith, Ms. Williams, Mr. Boone, Mr. Evans, and Mr. McDermott.

Did I read that correctly?

THE JURY: Yes.

THE COURT: If that's what you want we will provide you with these transcripts. We may do that on a rolling basis so that you're not waiting while we -- because this has to be prepared for you. So, for example, what we would need to do -- any time that there was a sidebar or an objection that was sustained, that stuff has to be redacted so that you only have

before you in the transcript what's in evidence. And then there's just the logistical matter of making copies. We propose to send in less than twelve copies, say four sets of each one of these, so that the jury can work with that. And if there's a request for more, please let us know.

The other thing is with respect to two of your requests, the Kev -- the transcripts of the Kevin Gotti video. Those transcripts are not in evidence. So if you want to review those and if you want to see the 911 -- if you want to hear the 911 call again, we can do that first thing in the morning. So we would have to bring you out to show you -- we can show you the video with the transcripts and we can play the 911 -- the 911 call again for you. But that doesn't go back into the jury room. In the meantime we'll work on getting these transcripts for you.

You should also, again, because -- again there's just a logistical issue of getting all of this done, continue to deliberate as well as you can, as much as you can while we get all this for you. Okay.

Very well. So, bright and early tomorrow morning at 9:30.

Have a wonderful evening.

And you may still not discuss this unless you are in the jury room.

(Jury excused)

THE COURT: I guess I'm looking at the government's table. Do you have the transcripts in a manner that can be -- do the parties have the transcripts electronically that you can work through and printout versions that are acceptable?

MR. BUCHWALD: I think we're going to need to rely on you folks to get out the colloquy so we'll just go through it.

MR. BAUER: What we would propose is that we take the first crack at this this evening, at least have Baynes and Mallory ready to go at 9:30 in the morning. So we'll have Baynes and Mallory ready and we can e-mail you Baynes and Mallory so you can look at it. If you have any comments let us know before 9:30 so at 9:30 they'll have them.

THE COURT: So also since they're asking for the entirety of the transcript the only thing that needs to do is have the stricken testimony and the objections taken out and that's it so there should be fairly no controversy.

MR. GOLTZER: Nothing.

MR. DRATEL: Nothing about subject matter.

THE COURT: Exactly.

Thank you in advance. This appears -- I can't imagine what else they'll ask for after this.

(Adjourned to August 22, 2014 at 9:30 a.m.)